No. 80-1609

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In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

PROLERIZED NEW ENGLAND COMPANY
AND
HARTFORD ACCIDENT & INDEMNITY COMPANY,
PETITIONERS,
v.
BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
AND
RICHARD F. McNEIL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.[1]

This case presents important questions concerning the jurisdictional scope of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (the "Act"), and concerning the allocation under the Act of fact-finding and decision-making functions between the administrative law judge (the "ALJ"), the Benefits Review Board, and the courts.

In this case, the ALJ found that Richard F. McNeil, an employee of Prolerized New England Company, "occasionally" engaged in longshoring activities, but that these activities were insufficient to bring him within the scope of the Act. The Benefits Review Board ruled, however, that under this Court's decision in *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977), it is sufficient for coverage that an employee has engaged in longshoring activities "on occasion." The Board also made certain factual findings concerning one aspect of McNeil's duties. The Court of Appeals ruled that it was unnecessary to decide whether "occasional" duties are sufficient to establish coverage because the Court concluded on the basis of the Board's findings that "a substantial portion" of McNeil's duties involved longshoring activity.

The decision of the Court of Appeals therefore presents the following three questions:

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[1] All parties to the proceeding in the United States Court of Appeals for the First Circuit are named in the caption. Prolerized New England Company ("Prolerized") is a joint venture of Hugo Neu Steel Products, Inc. (which is a subsidiary of Hugo Neu & Sons, Inc.) and Proleride Transport Systems, Inc. (which is a subsidiary of Proler International Corporation). Hugo Neu-Proler Company is an affiliated company. Hartford Accident & Indemnity Company is a subsidiary of the Hartford Insurance Group. Affiliated companies are Hartford Fire Insurance Co., Hartford Life Insurance Co., Hartford Casualty Insurance Co., New York Underwriters Insurance Co., and Twin City Fire Insurance Co.

1. Does the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act extend to an employee when both the administrative law judge and the Benefits Review Board found that the employee was employed as a maintenance man and that he only "occasionally" engaged in longshoring activities?

2. Does the Court of Appeals' affirmance of the decision of the Benefits Review Board on a ground not addressed or relied upon by the Board conflict with this Court's decisions in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943), *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947), and progeny?

3. Did the Court of Appeals err in holding — contrary to the Second and Third Circuits — that the Benefits Review Board may make its own findings of facts instead of remanding the case to an administrative law judge if additional findings are deemed necessary?

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Opinions Below.

The opinion of the Court of Appeals is unofficially reported at 637 F.2d 30 (1st Cir. 1980). It appears in the Appendix, ("A. ") *infra* at pages 1a to 18a. The Decision and Order of

the ALJ filed on May 9, 1977 is unreported and appears in the Appendix, *infra* at pages 19a to 32a. The Decision of the Benefits Review Board dated March 20, 1978 is unofficially reported at 8 BRBS 1 and appears in the Appendix, *infra* at pages 33a to 40a. The Supplemental Decision and Order on Remand of the ALJ filed November 28, 1978 is unreported and appears in the Appendix, *infra* at pages 41a to 77a. The Decision and Order of the Benefits Review Board dated December 7, 1979 is unofficially reported at 11 BRBS 576, and appears in the Appendix, *infra* at pages 78a to 87a.

Jurisdiction.

The decree of the Court of Appeals was entered on December 23, 1980 (A. 88a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3), provides:

> When used in this chapter —
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> * * * *
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . .

Sections 21(b)(3) and 21(b)(4) of the Act, 33 U.S.C. §§ 921(b)(3) and (4), provide:

> The [Benefits Review] Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. . . .
>
> (4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. . . .

Statement of the Case.

On August 21, 1975, Richard McNeil, an employee of Prolerized, was injured in the course of his employment at Prolerized's facility in Everett, Massachusetts.[2] This case concerns his claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act.

Prolerized operates a scrap metal business in Everett, Massachusetts. Prolerized buys scrap metal in the form of junk cars and other items and reprocesses it in one of two ways. Approximately 60% of the scrap is reprocessed in a "Prolo Mill," which breaks up junk cars and other items into fist-sized chunks, separating metals from plastic, glass and

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[2] Following his accident, McNeil received benefits pursuant to the Massachusetts state Workers' Compensation Law (A. 20a).

other materials and separating ferrous from non-ferrous metals. The other 40% of the scrap is processed by a Shear which cuts up heavier steel into pieces of four feet or less. After being processed by either of these methods, the metal is stockpiled in Prolerized's yard where it awaits shipment. Most, but not all, of the end product of both processes is loaded onto ships by Prolerized employees from a dock at the southern end of Prolerized's facility. Ships arrive on an average of once a month and are ordinarily loaded in two or three days. *See* Appendix pages 2a-3a, 22a-23a and 34a-35a.

McNeil was employed by Prolerized as a maintenance man for 2½ years prior to his injury. As such, he was responsible for the maintenance and repair of all company equipment (A. 3a, 23a). At the time of his injury, and for several months prior thereto, McNeil was assigned to the night maintenance shift, performing normal maintenance and repair on the Prolo Mill (A. 24a, 29a). During that period, McNeil also was responsible for changing the filters on the Shear on Saturday mornings (A. 11a, 29a-30a). At unspecified times prior to the time that he was assigned to the night maintenance shift, McNeil "occasionally" assisted in loading ships or manning lines on the dock, "occasionally" was required to go aboard ships to repair equipment, and "on occasion" operated the Shear (A. 23a-24a, 35a, 38a). "[A]t different times" he also repaired shiploading equipment and the Shear (A. 26a). However, the loading of ships and the maintenance of shiploading equipment were the regular duties of the "shiploader" crew, a separate group of Prolerized employees paid at a higher rate than employees such as McNeil (A. 23a, 26a). Even when a ship was being loaded, McNeil was regularly assigned to his maintenance duties and not to shiploading duties (R. 99-100, 112). However, when ships were loaded with Sheared metal, additional manpower was sometimes required and other employees would be assigned to assist the shipload-

ing crew[3] (R. 68, 111-112). On occasion, McNeil was among the employees so assigned (R. 68; A. 24a). He testified that "[t]hey'd only call us down for an hour or two and then they'd send us back to our other job" (R. 112).

The administrative law judge found that "at the time of his injury" and "for several months prior thereto," McNeil "was employed in the manufacturing, or reprocessing, phase of Employer's operation which was wholly separate and distinct from the loading of vessels" (A. 24a, 25a-26a), and concluded that McNeil was "engaged in maritime employment" within the meaning of Section 2(3) of the Act. He therefore dismissed the claim for lack of jurisdiction[4] (A. 31a-32a). On appeal, the Benefits Review Board reversed and remanded to the ALJ for further proceedings (A. 40a). On remand, the ALJ, "constrained by the Board's decision," entered a compensation order in favor of McNeil, but reaffirmed his original findings of fact and conclusions (A. 42a, 45a-49a, 75a n.3). On appeal, the Board ruled that its first decision was the "law of the case" with respect to the jurisdictional issues (A. 79a). On February 4, 1980, Prolerized and Hartford, its insurance carrier, filed a petition for review with the United States Court of Appeals for the First Circuit pursuant to Section 21(c) of the Act, 33 U.S.C. § 921(c). A decree affirming the order of the Board was entered on December 23, 1980 (A. 88a).

Reasons for Granting the Writ.

1. The decision of the Court of Appeals affirms a decision which constitutes the broadest assertion of jurisdiction which

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[3] McNeil testified that no additional manpower was needed, and he performed no duties, in connection with the loading of "prolo" steel, which comprises 60% of Prolerized's business (R. 37, 43).

[4] The ALJ (and subsequently the Board and the First Circuit) also made rulings on other issues, which are not the subject of this petition.

the Benefits Review Board has ever made.[5] In this case, the Benefits Review Board ruled that an employee who performs longshoring duties only "occasionally" is "engaged in maritime employment" within the meaning of Section 2(3) of the Act (A. 38a). The Board based its decision on this Court's opinion in *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977) ("*Caputo*"), and in particular on this Court's statement in *Caputo* that the Act covers "persons whose employment is such that they spend [at least] some of their time in indisputably longshoring operations" (A. 37a, *citing Caputo, supra*, 432 U.S. at 273).

This question is one which this Court should decide. First, it involves the jurisdictional scope of an important federal statute, and the concomitant preemption of state workers' compensation laws. It involves a jurisdictional question under the Act which this Court has yet to consider — the degree or extent to which an employee's duties must be maritime in nature for the employee to be considered engaged in maritime employment.[6]

Second, it involves the interpretation of this Court's decisions in *Caputo, supra*, and *Ford, supra*, and hence is one which only this Court can conclusively resolve. In two recent cases, the Board and the Fifth Circuit have reached opposite results on this question. *Boudloche* v. *Howard Trucking Co.*,

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[5] The Board in fact has treated its opinion in this case as a landmark. *See, e.g., Sedmak* v. *Perini North River Associates*, BRB No. 77-896, 9 BRBS 378 (1978), *reversed sub nom. Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028, *on remand*, 622 F.2d 1111 (2d Cir. 1980).

[6] Both of the decisions which this Court has issued under the 1972 Amendments to the Act — *Caputo, supra*, and *P.C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69 (1979) ("*Ford*") principally involved the question of whether duties other than traditional stevedoring, the actual loading of vessels, were in fact "integral to the loading process" and hence "maritime employment."

Inc., BRB No. 78-383, 11 BRBS 687 (1979), *reversed and remanded*, 632 F.2d 1346 (5th Cir. 1980), *cert. filed*, Docket No. 80-1563, March 14, 1981; *Howard* v. *Rebel Well Service*, BRB No. 78-502, 11 BRBS 568 (1979), *reversed and remanded*, 632 F.2d 1348 (5th Cir. 1980). As a result of these Fifth Circuit decisions, there is also a conflict in the circuits, because with the exception of the Fifth Circuit, the courts of appeals have uniformly held that it is insufficient for coverage under the Act that an employee occasionally may have engaged in longshoring activities. *See, e.g., Cargill, Inc.* v. *Powell*, 573 F.2d 561, 563-64 (9th Cir. 1977), *vacated and remanded on other grounds*, 444 U.S. 987 (1979); *Fusco* v. *Perini North River Associates, supra* note 5; *Dravo Corp.* v. *Banks*, 567 F.2d 593, 595 (3d Cir. 1977); *Maher Terminals, Inc.* v. *Farrell*, 548 F.2d 476, 478 (3d Cir. 1977), *cited with approval in Caputo, supra*, 432 U.S. at 272-73 n.34.

Third, the issue is likely to recur frequently, because many employees of a covered employer may have a colorable claim that they have performed maritime duties "on occasion."

Fourth, the Board has misinterpreted this Court's decision in *Caputo, supra*, so as to extend the Act beyond the scope intended by Congress. The Board reasoned that, since the 1972 Amendments were intended to provide "continuous coverage" for longshoremen, an employee who engages in any longshoring activity must be covered by the Act over the entire course of his or her employment. However, there is nothing in *Caputo*, which involved a longshoreman who engaged in longshoring operations on a daily basis, which suggests that the Act applies to any employee who ever engages in any longshoring operations, regardless of how infrequently the employee does so. On the contrary, the Court in *Caputo* emphasized that an employee is covered by the statute only if he is engaged in one of the occupations specified by the Act. 432 U.S. at 273, 276; *accord, Ford, supra*, 444 U.S. at 80 (the Act establishes "an

occupational test which focuses on loading and unloading"). Whereas the employees involved in *Caputo* were clearly longshoremen, McNeil's "occasional" longshoring duties were so infrequent and insignificant that he was not employed as a "longshoreman" at all. Under the Board's decision in this case, however, the Act would apply to an employee who had not performed longshoring activities for several years or to an employee who performs longshoring activities on one day per year. Such an interpretation conflicts with Congress' intent in enacting Section 2(3), which was to restrict the coverage of the Act to employees whose duties bear a realistically significant relationship to maritime commerce. *See* S. Rep. No. 92-1125, 92d Cong., 2d Sess., p. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., p. 11 (1972); *Ford, supra*, 444 U.S. at 79-80 and n.10. Such an expansive interpretation also would result in a substantial and unintended preemption of state workers' compensation statutes.

The jurisdictional issues in this case are worthy of this Court's consideration for an additional reason. The decisions of the Board and the First Circuit both were predicated in part on the conclusion that Prolerized's Shear was an "integral" part of the loading process, even though the ALJ found that the Shear was part of Prolerized's manufacturing or reprocessing operation (and even though McNeil's only duty with respect to the Shear "for several months" prior to his injury was to change the filter on Saturday mornings).[7] As the First Circuit recognized (A. 9a), the question of how to "distinguish preparation for shipment from manufacture" is "one of first impression." It is an important issue. The First Circuit essentially held that if a process which transforms a product facilitates the loading of vessels, the process is maritime in

[7] The administrative law issues presented by this conclusion are discussed below.

nature even though the process obviously serves other objectives as well. Under this reasoning, a wide variety of other processes, such as oil refining, liquification of natural gas, pulverization of stone and gravel, sawing of lumber and distillation of liquids, also could be considered "integral to the loading process" and employees in those operations could be considered "engaged in maritime employment." Such a definition extends the scope of the Act far beyond that intended by Congress, which in 1972 narrowed the class of occupations covered by the Act. *Caputo, supra*, 432 U.S. at 264-65; *Ford, supra*, 444 U.S. at 79-80 and n.10 (quoting Senate and House Committee reports).

2. The decision of the Court of Appeals misallocates the fact-finding and decision-making functions under the Act, conflicting in one respect with decisions of the Second and Third Circuits and in another respect with this Court's decisions in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943), 332 U.S. 194 (1947), and progeny.

The Court of Appeals avoided the conclusion that McNeil's "occasional" longshoring duties were insufficient for coverage under the Act by finding that these "occasional" duties, when taken together with his work on the Shear, constituted "a substantial portion" of his duties. In making this finding, however, the Court of Appeals misperceived the proper allocation of fact-finding and decision-making functions under the Act in two critical respects. First, it endorsed the Benefits Review Board's admitted "foray into the record" (A. 8a), despite the Board's "restricted fact-finding authority," *id.*, concerning the nature of the Shear, which admittedly was a "[c]rucial" factual issue (A. 5a). Second, the Court failed to address the propriety of the Board's decision and instead affirmed the Board's order on an entirely different ground, characterizing McNeil's longshoring duties as "substantial" when neither the ALJ nor the Board itself was willing to do so.

With respect to the allocation of decision-making functions, the First Circuit's decision conflicts with this Court's decisions in *Chenery I, supra*, and *Chenery II, supra*. The First Circuit sustained the Board's order on the ground that "a substantial portion of McNeil's duties involved longshoring activity" (A. 11a). However, the Board made no such finding or conclusion. Rather, the Board adopted the ALJ's findings that McNeil "occasionally" repaired loading equipment, "occasionally" manned lines or otherwise assisted in loading, and "on occasion" operated the Shear, concluding that such occasional duties were sufficient for coverage under this Court's decision in *Caputo, supra* (A. 35a, 38a). Thus, although the First Circuit found it unnecessary to reach "the Director's contention that the 'occasional' longshoring duties found by the ALJ would suffice to establish status" (A. 13a n.3), the Court ignored that the Board itself relied on this ground. In these circumstances, it was incumbent on the First Circuit to address the Board's rationale or remand the case for reconsideration. As this Court stated in *Chenery II*:

> a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If these grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

332 U.S. at 196. It was inconsistent with *Chenery, supra*, for the First Circuit to review McNeil's testimony *de novo* and to

determine that, although both the ALJ and Board characterized McNeil's longshoring duties as "occasional," this characterization was "unwarranted" (A. 13a n.3).

With respect to the allocation of fact-finding functions, the First Circuit's decision conflicts in principle with decisions of the Second and Third Circuits. The First Circuit recognized that, unlike agencies such as the National Labor Relations Board, the Board may not "engage in de novo review and substitute its findings for the ALJ's" (A. 8a). The First Circuit nevertheless affirmed the Board's "foray into the record" on a number of factual issues, "the most significant" of which was "the Board's resort to the record to determine the function of the Shear" (A. 7a, 8a). The First Circuit's decision in this regard conflicts with the decisions of the Second Circuit in *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670 (2d Cir. 1979), *vacated and remanded on other grounds*, 446 U.S. 905, *on remand*, 624 F.2d 5 (2d Cir. 1980), and the Third Circuit's decisions in *Sun Shipbuilding & Dry Dock Co.* v. *McCabe*, 593 F.2d 234, 237 n.1 (3d Cir. 1979), and *Atlantic & Gulf Stevedores, Inc.* v. *Director, Office of Workers' Compensation Programs*, 542 F.2d 602, 608 (3d Cir. 1976). In those cases, the Second and Third Circuits recognized that the admonition in Section 21(b)(3) of the Act, that the ALJ's "findings of fact . . . shall be conclusive if supported by substantial evidence in the record considered as a whole," requires that the Board refrain from making its own findings of fact. As the Second Circuit stated in *Walter Tantzen, Inc.* v. *Shaughnessy, supra*:

> We deprecate the course followed by the BRB in supplementing the ALJ's findings with its own findings, especially on contested matters . . . . If additional findings are necessary the BRB may 'remand a case to the administrative law judge' to make additional findings . . . .

> Except with respect to uncontested matters, the BRB is not entitled to make its own findings of fact, nor are we.

601 F.2d at 672 n.3. *See also Presley* v. *Tinsley Maintenance Serv.*, 542 F.2d 433, 436 (5th Cir. 1976):

> the Board does not have the authority to engage in *de novo* review of the evidence, or to substitute its view for that of the administrative law judge. . . . The administrative law judge alone is charged with the duty of selecting the inference which seems most reasonable and his choice if supported by the evidence, may not be disturbed.[8]

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[8] Without addressing the merits at length, we note that the reasons offered by the Court of Appeals to justify the Board's "foray" in the record were not substantial.

First, although the Court stated that "claimants' testimony on the function of the Shear was uncontested" (A. 8a), McNeil himself admitted that the sheared metal was not necessarily loaded onto ships (R. 38; A. 23a).

Second, although the Court stated that "the ALJ did not discredit this . . . testimony, nor did he make any contrary finding with respect to the Shear's function" (A. 8a), the ALJ made his findings on "the basis of the entire record, including [his] observation of the witnesses and their demeanor" (A. 21a). He noted that McNeil changed the filters on the Shear on Saturday mornings but nevertheless concluded that "at the time of his injury" and "for several months prior thereto" (A. 24a, 30a, 31a), McNeil "was employed in the manufacturing, or reprocessing, phase of Employer's operation which was wholly separate and distinct from the loading of vessels" (A. 30a). In fact, the ALJ specifically found that metal is "processed" through the Shear (A. 23a). Thus, while not discrediting McNeil *in haec verba*, the ALJ clearly found, despite McNeil's testimony, that the Shear was part of a manufacturing operation unrelated to maritime transportation. Any doubt in this regard was resolved by the ALJ's decision on remand in which he adhered to his prior findings, protesting vigorously that the Board's "findings and conclusions" were unwarranted (A. 42a, 45a-49a, 75a n.3).

Third, the Court stated that the ALJ "significantly failed to assert that the Prolerized Shear differed from the shearer machine" in *Shoemaker* v. *Schia-*

The First Circuit's rulings on these administrative law issues are also worthy of consideration by this Court because they undermine the efficient and economical administration of the Act, an important federal statutory scheme, which depends upon a proper and predictable allocation of the fact-finding and decision-making functions. If the Benefits Review Board may make its own findings of fact, the statutory objective of having factual matters settled at the lowest administrative level will be lost. Cases which present no substantial issues will be appealed to the Board by litigants — in this case the employee, in other cases the employer — hoping to get "a second bite at the apple." The Board turn will become mired in an area in which it has no special expertise and in particular lacks the advantage of being able to weigh testimony in light of the credibility of witnesses.[9] Similarly, if a court of appeals

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vone & Sons, Inc., BRB No. 75-160, 2 BRBS 257 (1975) (A. 8a). However, the ALJ specifically stated that "while *Shoemaker* involved . . . a shearer machine cutting scrap metal destined for export, . . . claimant [in this case] was injured while employed in the manufacturing, or reprocessing, phase of Employer's operation . . ." (A. 30a-31a).

Finally, the Court of Appeals stated that matters such as the function of the Shear "are presumptively within the employer's knowledge," and so "doubtful questions should be resolved in favor of the injured employee . . ." (A. 13a). In this regard the First Circuit's decision conflicts with the Seventh Circuit's decision in *Motteler* v. *J.A. Jones Constr. Co.*, 457 F.2d 917 (7th Cir.), *cert. denied*, 409 U.S. 813 (1972), which held that a claimant bears the burden of proof on jurisdictional issues. This Court has just granted certiorari to review the issue of such presumptions and burdens under the Act. *U.S. Indus./Federal Sheet Metal, Inc.* v. *Director, Office of Workers' Compensation Programs, U.S. Department of Labor*, Docket No. 80-518, *cert. granted*, March 9, 1981.

[9] It should be emphasized that the Board's "fact-finding" in this case intruded into the core of the ALJ's prerogative — assessment of the credibility of witnesses. As the First Circuit recognized, the Board's finding on this "crucial" point was entirely based on McNeil's single statement "that the purpose of cutting scrap into four foot lengths in the Shear was to fit the steel into the holds of ships" (A. 5a). The First Circuit's decision thus effectively held that the Board is free to credit, and make findings based upon, any testimony not *in haec verba* discredited by the ALJ.

may affirm the Board's decision on a basis not relied upon by the Board, it will "propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Chenery II, supra*, 332 U.S. at 196. It will also encourage litigants before the Board to appeal adverse decisions to the courts of appeals on grounds which the Board never had the opportunity to consider. Finally, it is inevitable that these issues will recur on a continuous basis. Every case under the Act — and its various extensions — necessarily involves the issue of allocation of the fact-finding and decision-making functions.

Conclusion.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendices

United States Court of Appeals

For the First Circuit

No. 80-1086

PROLERIZED NEW ENGLAND COMPANY,
EMPLOYER-PETITIONER, AND
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
CARRIER-PETITIONER,
v.
BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,
RESPONDENT.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
RESPONDENT, AND
RICHARD F. McNEIL,
CLAIMANT-RESPONDENT.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR

Before COFFIN, *Chief Judge*,
BOWNES, *Circuit Judge*,
WYZANSKI, *Senior District Judge**

David M. Mandel, with whom *Richard P. Ward*, *Ropes & Gray*, *Timothy F. Nevils*, and *Sullivan and Cronin* were on joint brief, for petitioners.

* Of the District of Massachusetts, sitting by designation.

Mark C. Walters, Attorney, United States Department of Labor, with whom *Carin Ann Clauss*, Solicitor of Labor, *Laurie M. Streeter*, Associate Solicitor, and *Gilbert T. Renaut*, Attorney, United States Department of Labor, were on brief, for Federal respondent.

David M. Wright, *Jacob M. Atwood*, and *Atwood & Wright* on brief for claimant-respondent, Richard F. McNeil.

December 23, 1980

Coffin, *Chief Judge*. Prolerized New England Company and its compensation carrier petition for review of a decision of the Benefits Review Board, awarding claimant Richard F. McNeil disability benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (LHWCA or the Act). McNeil became totally disabled as a result of injuries suffered in a fall while employed at Prolerized. The Board based its award on the necessary twin findings that McNeil was engaged in "maritime employment" and that the situs of his injury was an area adjoining navigable waters used in loading vessels. Petitioners contest the award, arguing that McNeil failed to satisfy either branch of the Act's dual status-situs test of coverage, and object to the Board's assessment of a penalty against Prolerized under § 14(e) of the Act.

Facts and Prior Proceedings

Prolerized operates a scrap metal business in Everett, Massachusetts alongside the Mystic River. The facility has its own shiploading equipment and dock from which Prolerized workers load the great bulk of the company's product onto ships. Prolerized buys scrap metal in the form of junked cars, old railroad rails and other items, and processes it in one of two ways, depending upon the type of material. Approximately 60 percent of the scrap is reprocessed in the "Prolo

Mill" which separates ferrous metal from other materials such as plastic, glass and non-ferrous metals. This unusual process, named "prolerization" after its inventor, uses a high-speed 55-ton hammer-and-wheel assembly to break up automobiles and large appliances into fist-sized chunks in a few seconds. Magnets extract the ferrous metal while other mill machinery separates and washes non-ferrous metals such as brass, aluminum and copper, and removes the residue. The incoming scrap is fed into the mill by an eight-foot wide conveyor known as the "8-Y" conveyor. The processed steel, called "prolo steel", is transported by another conveyor to stockpiles in the yard where it awaits shipment.

The other 40 percent of the scrap purchased by the company, consisting of thickness grades No. 1 and 2 steel, is not prolerized, but goes instead to the "Shear", located on Prolerized's property several hundred feet away from the Prolo Mill. Like the Prolo Mill, the Shear is a gargantuan piece of machinery, but its more simple function is to cut scrap steel into short lengths, four feet long or less. After being cut, the steel is stockpiled and eventually moved by truck to the dock where it is loaded onto ships. Almost all of the end product of both processes is shipped from the dock at the Prolerized facility.[1] Ships arrive on an average of once a month and are ordinarily loaded in two to three days.

The claimant, McNeil, had worked at Prolerized as a maintenance man for two and one half years before he was injured. The Administrative Law Judge (ALJ) found that his duties involved the maintenance and repair of "all company equipment", and that he had in fact worked on all of the equipment at the facility, including the Shear, Prolo Mill and shiploading equipment. The ALJ also found that McNeil was

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[1] McNeil testified without contradiction that 95% of the processed steel leaves by water.

required "on occasion" to go aboard ship and assist directly in loading or repair loading equipment that had broken down during the loading process. More important in the ALJ's estimation, however, was his finding that McNeil was not classified as a "shiploader". The shiploader crew was a separate group of Prolerized employees paid at a slightly higher rate than McNeil. Their regular duties were to perform loading operations and, when not loading a ship, to maintain the loading equipment. Thus, the ALJ found that McNeil's regular duties did not require him to go aboard ship unless the shiploaders were shorthanded or some piece of loading equipment needed repair during a loading operation.

At the time of his injury, McNeil had been assigned to the night shift for "several" months. There was no ship at the Prolerized dock and had been none for at least two months. On the evening of August 21, 1975 McNeil reported for work and was assigned to replace wheels and pins on the 8-Y conveyor leading to the Prolo Mill. While working there he fell 15 feet from the apron of the conveyor to the ground, seriously injuring his shoulder, arm and hand.

Based on these facts the ALJ decided that McNeil was not engaged in "maritime employment" within the meaning of 33 U.S.C. § 902(3). He concluded that McNeil's employment at the time of his injury was completely unrelated to the loading of any vessel for two reasons. First, he viewed the Prolo Mill as a distinct manufacturing process rather than part of the overall loading operation. Since repair and maintenance of shiploading equipment was the responsibility of the shiploader crew when not loading a ship, and no ships had been loaded for two months, the ALJ determined that McNeil's maintenance duties had been confined to the manufacturing end of Prolerized's operation "for a substantial period of time" before the accident. Second, the ALJ rejected McNeil's "implicit" contention that because he had occasionally worked aboard

ship, all of his activities were transformed into maritime employment. The ALJ distinguished and questioned the continued viability of an earlier Board precedent, *Shoemaker* v. *Schiavone & Sons, Inc.*, 2 B.R.B.S. 257 (1975), that upheld coverage for an employee injured while operating a shearer machine which, like the Prolerized Shear, cut scrap metal destined for export. The ALJ suggested that McNeil's relation to waterborne transportation at the time of his injury was more remote than the claimant's in *Shoemaker* and that, in any event, the Board had later retreated from *Shoemaker*. Finally, without explanation, the ALJ concluded that McNeil's injury had not occurred on a covered situs as described in § 3(a) of the Act, 33 U.S.C. § 903(a).

The Board reversed the ALJ's decision as unsupported by substantial evidence and erroneous as a matter of law. The ALJ's major legal error, according to the Board, was in applying a strict "moment of injury" test which looked only to the particular task performed by the claimant at the time of injury. The moment of injury test was rejected by this court in *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); and by the Supreme Court in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977). The Board evaluated the ALJ's findings with regard to McNeil's duties and determined that his responsibilities were "an integral part of the loading process". Crucial to the Board's conclusion was its finding, based on McNeil's testimony, that the purpose of cutting scrap to four foot lengths in the Shear was to fit the steel into the holds of ships. Cumulating all of McNeil's loading-related activities including actual loading, repair of loading equipment and operation and maintenance of the Shear, the Board concluded that McNeil was engaged in maritime employment when injured. In reaching this conclusion the Board expressly rejected the ALJ's reliance on McNeil's job classification as dispositive

of status. The Board also reversed the ALJ's decision on situs, holding that McNeil's injury occurred in an "adjoining area customarily used by an employer in loading a vessel". Section 3(a), 33 U.S.C. § 903(a).

On remand, the ALJ entered a compensation order finding McNeil temporarily totally disabled, while protesting vehemently that his earlier ruling was correct. This appeal followed.

Status

33 U.S.C. § 902(3), referred to as the "status" requirement, defines the term "employee" as: "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations. . . ." Since this requirement was added to the Act in 1972 courts have struggled to interpret the phrase "maritime employment" consonant with the wisdom that "[a]ny legislative scheme that compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement." *Davis* v. *Dept. of Labor*, 317 U.S. 249, 258 (1942) (Frankfurter, J., concurring). *See P.C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69 (1979); *Northeast Marine Terminal Co.* v. *Caputo, supra; Stockman* v. *John T. Clark & Son of Boston, Inc., supra*. This case is different from most decided under the 1972 amendments in that here at least some of the cargo destined for shipment was processed at the water's edge before shipping, adding another facet to the interface between land and sea-borne transportation. Despite this complicating factor, the Board applied conventional analysis, asking whether McNeil's responsibilities were "an integral part of the loading process". *See Ford, supra*, at 83; *Caputo, supra*, at 271.

On the question of "status", petitioners' major contention is that the Board impermissibly intruded on the fact-finding

province of the ALJ by determining for itself the relation of claimant's duties to the shiploading process. Petitioners urge that we defer to the ALJ's view of claimant's employment status rather than the Board's. Petitioners further contend that the ALJ properly assessed the character of claimant's duties over a "substantial period of time" prior to his injury and that the Board erred as a matter of law both in broadening the time frame for its status inquiry and in relying on mere "occasional" duties to determine status. Even if the Board's scope of inquiry was correct and occasional duties suffice, argue petitioners, claimant's maintenance duties were typical of the support services necessary for any land-based operation and therefore not peculiarly maritime in nature.

Much of petitioners' argument is based on what we conceive to be a mischaracterization of the Board's decision. The Board did not, as we read its opinion, decide that the Prolo Mill was an integral part of the loading process; rather, it distinguished the operation of the Prolo Mill and the Shear and determined only that the latter bore an integral relationship to loading. If the Board had treated the Prolo Mill as part of the loading process, there would be some force to petitioners' argument that the prolerizing operation interrupted the loading process so as to interrupt coverage under the Act. This is particularly true in light of the Board's latter adoption of that position in *Castro* v. *Hugo Neu-Proler Co.*, 10 B.R.B.S. 35 (1979). Inasmuch as the Board confined itself to the Shear in this case, however, its opinion is entirely consistent with Board precedent. *See Shoemaker* v. *Schiavone & Sons, Inc., supra.*

Turning to the complaint that the Board impermissibly engaged in factfinding, we consider the most significant instance to be the Board's resort to the record to determine the function of the Shear. The Board found that the Shear's function was to facilitate shiploading based on the claimant's testimony alone; the ALJ made no such finding. In its review of

the ALJ's findings the Board is more restricted than other similar entities such as the National Labor Relations Board. It is bound to uphold the ALJ's findings if supported by substantial evidence. Section 921(b)(3). It may not engage in de novo review and substitute its findings for the ALJ's. *Presley* v. *Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976). Our review of the Board's decision is in turn limited to "errors of law, including . . . whether the Board adhered to the substantial evidence standard in its review of factual findings" by the ALJ. *Bath Iron Works Corp.* v. *White*, 584 F.2d 569, 574 (1st Cir. 1978). Thus, under the LHWCA, when the Board and ALJ disagree on factual matters, we owe deference to the ALJ; under the National Labor Relations Act by contrast, we defer to the Labor Board. *See Avondale Shipyards, Inc.* v. *Vinson*, 623 F.2d 1117, 1119 n. 1 (5th Cir. 1980); *Air America, Inc.* v. *Director, OWCP*, 597 F.2d 773, 780 (1st Cir. 1979).

Despite the Board's restricted fact-finding authority, we conclude for several reasons that its foray into the record was justified in this case. First, claimant's testimony on the function of the Shear was uncontested. Petitioners failed to put on any evidence concerning the nature of the operations at Prolerized, despite the invitation of the ALJ to do so. Second, the ALJ did not discredit this or any other portion of claimant's testimony, nor did he make any contrary finding with respect to the Shear's function. Instead, the ALJ chose to ignore the Shear, which accounted for 40 percent of Prolerized's operation. Thus, the Board's finding does not conflict with the facts as found by the ALJ. Third, in questioning and attempting to distinguish *Shoemaker* the ALJ significantly failed to assert that the Prolerized Shear differed from the shearer machine held in *Shoemaker* to be part of the loading process. Under these circumstances, the Board was justified in concluding without a remand that the record would only support a find-

ing that the Shear's function was to cut steel to fit into the holds of ships.

Petitioners further contend that the characterization of the Shear's function as "integral" to the loading process was a factual finding committed to the ALJ. We disagree. Framing the scope of the loading process for the purpose of delineating the coverage of the Act is primarily a matter of policy. Although the inquiry may be fact-sensitive, the historical facts in this case are not disputed. Deciding the impact of the various types of maritime business organization on the coverage provisions of the Act must inevitably be informed by Congress' intent to apply "a simple, uniform standard of coverage." *Ford, supra*, 444 U.S. at 83. Neither we nor the Board owes special deference to the ALJ on such issues of statutory policy.

We also think that the Board's determination that the Shear was an integral part of the loading process was in accordance with law. This question turns on whether the Shear is properly viewed as a separate operation or as part of an integrated loading process. Formulating a standard to distinguish preparation for shipment from manufacture is not appreciably aided by reference to the case law. *Cf. Weyerhauser Co.* v. *Gilmore*, 528 F.2d 957, 961 (9th Cir.), *cert. denied*, 429 U.S. 868 (1976) ("realistically significant relationship" to maritime activity). Approaching the question as one of first impression, we think the Prolerized operation offers as good an illustration as one is likely to find of where the line should be drawn. The Prolo Mill actually changes the composition of scrap metal by separating it into component parts. Like a manufacturing process, it creates from raw material a recognizably different product. The Shear, on the other hand, merely changes the shape of scrap steel to prepare it for shipment. The steel is the same before and after, only its size has changed. On this record we think the Board was plainly within its bounds in concluding that the Shear was an integral part of the loading op-

eration. We are unimpressed with petitioners' argument that shortening steel also facilitates land transportation. The same can be said for cargo containers. The fact remains that in the normal course of operations the steel arrived by land and, after shearing, most, if not all, left by sea.

The Supreme Court in *Caputo* and *Ford* did not restrict "longshoring operations" to the actual carriage of cargo but applied a far more inclusive standard, asking whether the claimant was "engaged in intermediate steps of moving cargo between ship and land transportation." 444 U.S. at 83 (footnote omitted). The Court stressed in *Ford* that participation in any phase of the intermodal transfer of cargo was sufficient to establish status. "A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *Id.*, at 82-83. Viewed in terms of this functional analysis we are satisfied that the Shear was an intermediate and necessary step in the process of moving cargo from the land transportation on which it arrived to the ships on which it left. We see no principled basis for distinguishing McNeil's responsibilities from those of a worker like claimant Blundo in *Caputo* who checked and marked items of cargo as they were removed on shore from a cargo container. Blundo's activities followed, while McNeil's preceded, the process of preparing goods for shipment; one is merely the converse of the other. Once we regard shearing as the functional equivalent of packaging, we cannot exclude it from the larger loading process without erecting an untenable distinction between packing and unpacking.

This case is made considerably easier by the fact that the Shear is a physically distinct part of the employer's operation whose sole function is to prepare goods for shipment. More difficult problems of line-drawing would be presented if such a packing phase were physically and functionally integrated

into a shoreside manufacturing process, making it necessary to divide a continuous manufacturing-shipment continuum into its component processes. We need not formulate a rule to accommodate such a situation, however, since in this case we decide that the Shear is entirely distinct from manufacturing.

Our conclusion that the Shear was integral to the loading process blunts the force of petitioners' other principal line of attack aimed at the Board's supposed reliance on McNeil's "occasional" longshoring duties. The ALJ found that McNeil "on occasion" boarded ships to assist in positioning a collar and chute over the hold prior to loading, manned lines on the dock, and went aboard ship to repair loading equipment. To these two types of conventional longshoring activities — actual loading and repair of loading equipment — the Board added a third: maintenance and operation of the Shear. As noted, the ALJ failed to focus on the Shear, but he did find that McNeil worked on all of Prolerized's equipment including the Shear, and that the Shear accounted for 40 percent of the total operation. The ALJ also found that one of McNeil's regular duties at the time he was injured was to change filters on the Shear every Saturday morning.[2]

Taking these duties together, we think a substantial portion of McNeil's duties involved longshoring activity. In contrast to the diminution in McNeil's conventional longshoring activities found by the ALJ, there was no evidence that his duties with respect to the Shear were reduced in the weeks and months preceding his accident. To the contrary, McNeil testified without contradiction or challenge that before his accident "[t]he Shear was one of the main functions I was involved

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[2] When asked to describe the work he performed on the Shear McNeil replied:

> "Everything, from maintenance to cutting of the steel to running the operation, to pulling the maintenance when it broke down, what had to be done."

with because vacations were coming up in the summertime." Accordingly, we need not decide whether the ALJ used the proper time frame in assessing McNeil's non-Shear-related duties.

We reject petitioners' final argument that McNeil was not engaged in "maritime employment" because he principally repaired and maintained equipment rather than operated it. It is true that support services equally suited to land-based enterprises, such as office clerical work, do not qualify as maritime employment. *Maher Terminals, Inc.* v. *Farrell*, 548 F.2d 476, 476 (3d Cir. 1977). But we think that McNeil's repair, maintenance and occasional operation of the varied elements of Prolerized's integrated loading system qualify as peculiarly maritime services. As McNeil was directly involved in the movement of marine cargo, he falls within the broad concept of maritime employment. *See, e.g., Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167, 169-70 (4th Cir.), *cert denied*, 439 U.S. 979 (1978); *Vinciquerra* v. *Transocean Gatweay Corp.*, 1 B.R.B.S. 523 (1975). The ALJ was not bound to disregard McNeil's repair and operation of the shoreside shiploading equipment merely because he was not a member of the crew to which the employer assigned primary responsibility for those tasks. The Board properly looked beyond McNeil's job classification to evaluate the *actual* nature of his regularly assigned duties as a whole. *See Stockman, supra*, 539 F.2d at 275. Adhering to the employer's formal designation of duties, as did the ALJ, would allow an employer to manipulate LHWCA coverage by regularly assigning too few "longshoremen" for the job, thus requiring extra help as a matter of practice. Permitting coverage to fluctuate in this fashion would conflict with the intent of Congress that coverage should follow the occupation of the worker and not the employer's assignment policies. *Ford, supra*, at 83; *Odom Construction Co., Inc.* v. *United States Department of Labor*, 622 F.2d 110, 113 (5th Cir. 1980).

We therefore conclude that there is substantial evidence on the record as a whole to support the Board's conclusion that when injured McNeil was engaged in maritime employment. This conclusion is confirmed by the employer's failure to controvert McNeil's testimony as to his duties and the function of the Shear. Such matters are presumptively within the employer's knowledge. Even if the status issue were close, doubtful questions should be resolved in favor of the injured employee in order to place the burden of possible error on the employer who is better able to avoid the error and bear the loss. *Bath Iron Works Corp.* v. *White, supra,* 584 F.2d at 574.[3]

Situs

McNeil fell from the 8-Y conveyor leading to the Prolo Mill, approximately 1000 feet from the water's edge. To receive compensation, he must have been injured "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading . . . a vessel." 33 U.S.C. § 903(a). The Board held that McNeil was injured on a covered situs, reasoning that: "Claimant's injury was sustained at a site immediately next to

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[3]Since we veiw McNeil's duties as substantially maritime in nature we do not reach the Director's contention that the "occasional" longshoring duties found by the ALJ would suffice to establish status. We do note, however, that the ALJ's characterization of McNeil's indisputably longshoring activities as "occasional" appears to have been warranted. McNeil testified to extensive maritime work including totally refurbishing a dockside gantry and frequent major repairs on the shiploader conveyor when it broke down during loading. The ALJ did not discredit McNeil but inexplicably diminished his duties as "occasional". Some clue to the meaning of "occasional" may be found in the ALJ's observation that McNeil's "regular duties did not involve going aboard ship unless some problem arose requiring the repair of equipment . . . ." We take this to mean that a repairman generally is not called until something needs fixing.

the mill and near the dock and loading facilities adjacent to the Mystic River. It follows that claimant was injured on an adjoining area customarily used by an employer in loading a vessel."

This analysis leaves much to be desired. Plainly, the site of the injury must adjoin navigable waters, not a loading area as the Board would seem to have it. *Stockman, supra,* 539 F.2d at 272. The situs requirement is not satisfied merely because the injury occurred "near" a covered area. Even if "near" were enough, it is questionable that the Board could be sustained on its analysis since McNeil was injured several hundred yards away from the dock, and the 8-Y conveyor from which he fell, viewed functionally, was far removed from the loading of ships.

While we find the Board's approach inadequate, considerations of policy nevertheless lead us to uphold its decision. *Caputo* made clear that a covered "adjoining area" need not be entirely devoted to shiploading. Assuming that the statutory phrase "customarily used . . . in loading" modifies "terminal" as well as "adjoining area", the Court held an entire terminal facility covered when one of its two finger-piers was used to load and unload vessels. *Caputo, supra,* 432 U.S. at 281. A similarly expansive construction of "adjoining area" is necessary in this case to avoid resurrecting the evil of shifting coverage that Congress sought to avoid in the 1972 amendments. A crazy quilt pattern of situs coverage tracking the indistinct line between Prolerized's manufacturing and loading operations would produce uncertainty and confusion for employer and employees alike. We therefore conclude that McNeil's injury in an adjoining area used for both loading and manufacturing met the situs requirement.

Section 14(e) Penalty

Since Prolerized had failed to pay benefits or file a notice of controversion within fourteen days after having knowledge of his injury, claimant sought a 10 percent penalty on the benefits not timely paid pursuant to § 14(e) of the Act, 33 U.S.C. § 914(e).[4] While recognizing that Prolerized had not complied with § 14(e)'s literal terms, the ALJ nevertheless refused to impose the penalty on the ground that Prolerized had no knowledge that McNeil would claim LHWCA benefits at the time of his injury. On appeal by Prolerized and its carrier, the Board noticed the penalty issue sua sponte over a dissent and reversed the ALJ's determination, holding that the penalty was mandatory and could not be waived by the claimant.

Petitioners object that the Board unfairly deprived them of an opportunity to be heard and misconstrued § 14(e). The first objection is potentially troubling. Given the public interest in prompt voluntary payment of LHWCA benefits furthered by § 14(e), the Board had discretion to raise the issue on

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[4]Section 14(e) provides:

> "If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment."

Section 14(b) provides that

> "[t]he first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death . . . ."

Section 14(d) provides, in virtually identical language, that the employer must file notice of controversion "on or before the fourteenth day after he has knowledge of the alleged injury or death . . . ."

its own motion. But the exercise of this supervisory authority does not require ambushing litigants. If the penalty were indeed mandatory, notice would be of little use, but § 14(e) by its terms excuses payment of the penalty when an employer could not timely pay compensation "owing to conditions over which he had no control . . . ." Petitioners were at least entitled to an opportunity to make that showing. Their challenge to the Board's decision on this ground fails, however, because notwithstanding the lack of notice, the record reveals that petitioners took nothing for granted and vigorously defended the ALJ's penalty ruling before the Board.

Petitioners admit that they learned of McNeil's injury immediately but argue that the 14-day period referred to in § 14(e) should have been tolled until they reasonably should have known that the employee would claim compensation. Petitioners rely on McNeil's resort to the Massachusetts Workers' Compensation Act for this and prior injuries as evidence that they should not be held to have anticipated a LHWCA claim.

The Board rejected this argument, holding that the fourteen day period runs from the date of the employer's knowledge of injury or death. We cannot say that this literal interpretation of the language of § 14(b) and (d), *see* note 4, *supra*, is unreasonable or unfair where the employer has knowledge of a work-related injury but thinks LHWCA coverage is farfetched.[5] To avoid a penalty the employer need only file a notice of controversion or, if he admits coverage, pay benefits.

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[5]The cases cited by petitioners are not to the contrary. In *Universal Terminal & Stevedoring Corp.* v. *Parker*, 587 F.2d 608 (3d Cir. 1978), the employer voluntarily paid benefits while the injured employee recuperated. The court held that the employer was not required to file a notice of controversion on the claimant's return to work in order to avoid a penalty in the event that he later proved to have a permanent impairment. The dictum in *Strachan Shipping Co.* v. *Davis*, 571 F.2d 968, 974 (5th Cir. 1978) concerned the employer's lack of knowledge that an employee's lung disease was work-related.

Tying the 14-day period to the existence of a reasonable doubt of coverage would import consideration of the merits into what should be a routine ministerial determination.

Section 14(e) provides its own escape hatch when the employer has failed to make payments "owing to conditions over which he had no control . . . ." The showing in this case falls far short of that standard. Petitioners filed their notice only six days late, 20 days after the accident and several months before McNeil applied for federal benefits. We are left to wonder what occurred in those six days to alert petitioners to the possibility of a federal claim. Concurrent state and federal jurisdiction over shoreside injuries is well settled. *See Sun Ship, Inc.* v. *Commonwealth of Pennsylvania*, 48 U.S.L.W. 4826 (June 23, 1980). Thus, McNeil's application for state benefits in no way precluded a later federal claim and, as we have noted, the Board had allowed coverage for a worker with responsibilities similar to McNeil's in *Shoemaker, supra*, two years before the accident in this case. We will not disturb the Board's imposition of a penalty.

The Benefits Review Board as Respondent

The Director has moved to dismiss the Benefits Review Board on the ground that the Board is not a proper party respondent to a review proceeding under 33 U.S.C. § 921(c). We are aware that several of our sister circuits have granted similar motions. *See Nacirema Operating Co., Inc.* v. *Benefits Review Board*, 538 F.2d 73, 75 (3d Cir. 1976); *I.T.O. Corp. of Baltimore* v. *Benefits Review Board*, 529 F.2d 1080, 1088-89 (4th Cir. 1975), *modified en banc on other grounds*, 542 F.2d 903 (1976), *vacated and remanded on other grounds*, 433 U.S. 904, *on remand*, 563 F.2d 646 (1977); *Offshore Food Services, Inc.* v. *Benefits Review Board*, 524 F.2d 967 (5th Cir. 1975); *McCord* v. *Benefits Review Board*, 514 F.2d 198,

200-01 (D.C. Cir. 1975) (per curiam). Though we might well join these decisions, we decline to do so at this time. However anomalous it may seem to require an ajudicative body such as the Board to defend its decision on appeal, Fed. R. App. P. 15(a) requires that in "each" case where a party seeks review of an administrative order, "the agency shall be named respondent." "Agency" is defined in the rule to include "board, commission or officer". Moreover, the idea that the Board would appear in review proceedings under § 921 evidently was not wholly foreign to Congress, since at the same time it created the Board, Congress amended § 921A to provide that "[a]ttorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any proceeding under § 21 [33 U.S.C. § 921]." *See Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 43 n. 5 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminals Co.* v. *Caputo*, 432 U.S. 249 (1977).

While these provisions may not be dispositive, they do give us pause. We are particularly reluctant to pass on this question in view of the Director's failure to suggest any adverse consequence flowing from the Board's party status. As far as we can tell, the naming of the Board is a purely formal exercise. The Board has not filed a brief; even this motion was presented by the Director. The motion to dismiss is therefore denied without prejudice to a later effort by the Board to demonstrate that its dismissal would have some concrete significance.

Affirmed.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of
RICHARD F. McNEIL
Claimant

v.

PROLERIZED NEW ENGLAND COMPANY
Employer

HARTFORD ACCIDENT AND INDEMNITY COMPANY
Carrier

Case No. 77-LHCA-318
OWCP No. 1-21767

FILED AS PART OF THE RECORD
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(date)
/s/ _____
(Clerk)
Benefits Review Board

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Boston, Massachusetts 02108
For the Employer and Carrier

Before: WILLIAM B. DEVANEY
Administrative Law Judge

Decision and Order

Statement of the Case

This is a claim under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the "Act") by Richard F. McNeil, an employee of Prolerized New England Company, growing out of an injury suffered by Mr. McNeil on August 21, 1975. Benefits were, and are being paid under the Workmen's Compensation Act of the Commonwealth of Massachusetts.

Notice that right to compensation under the Act was controverted was filed by the Carrier, Hartford Accident & Indemnity Company, on September 10, 1975 (ALJ Exh. 2). Mr. McNeil's claim under the Act (ALJ Exh. 1) is dated December 19, 1975; but bears a date stamp on its face "Received Dec. 23, 1975, Boston Local Claims" and on the back a date stamp "1 OWCP Feb 05 1976", which would indicate that the claim was not received by the Office of the Deputy Commissioner for the First Region, Boston, until February 5, 1976.

The matter was referred for hearing by letter of the Deputy Commissioner dated January 6, 1977, and Notice of Hearing issued February 17, 1977, for a hearing in Boston, Massachusetts, on March 23, 1977, pursuant to which the hearing was duly held by the undersigned on March 23, 1977. At the conclusion of the hearing, March 30, 1977 was fixed as the mailing date for submission of post hearing briefs[1] and excellent briefs

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[1] By letter dated March 22, 1977, but not received until after March 23, 1977, Associate Solicitor Laurie M. Streeter advised this Office that the Office of the Solicitor, Division of Employee Benefits, would participate, but did not expect to appear at the formal hearing, by the filing of a post hearing brief. On March 25, 1977, Staff Attorney Linda Carroll, advised the undersigned of the letter dated March 22, 1977; acknowledged advice by Mr. Wright, attorney for Claimant, that the date for filing briefs was March

were received from counsel for the parties on April 1, 1977, having been timely mailed on March 30, 1977, which have been carefully considered. All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following decision and order:

The Issues

In his letter referring this matter for hearing, the Deputy Commissioner, in the penultimate paragraph, stated,

> "The sole issue in this case is whether the injury and the parties are subject to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended by PL 92-576." (ALJ Exh. 4).

At the commencement of the hearing, counsel for the Employer-Carrier (hereinafter referred to as "Employer" unless specifically indicated to the contrary) raised a further issue, namely extent of disability in the event the instant claim should be found to be subject to the Act. In view of the very

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30, 1977; and, on behalf of the Office of the Solicitor, requested an extension of time to file a brief because of prior commitments. In view of the requirement of Section 19(c) of the Act and the concerted effort of this Office to effect strict compliance therewith, the oral request for extension of time was denied; however, the undersigned assured Ms. Carroll that any brief received prior to issuance of decision herein would be considered. No brief has been received from the Office of the Solicitor.

proper, but none the less very specific delineation, of the sole issue by the Deputy Commissioner which did not include extent of disability, the parties were advised that this constituted, in the opinion of the undersigned, a new issue within the meaning of Section 702.236 of the Regulations and that Claimant would, in the absence of waiver after notice of the new issue, be given reasonable time to prepare for such new issue before any testimony was taken thereon. Claimant elected to call Doctor Robert D. Leffert, the same witness Employer sought to call, and, accordingly, fully and voluntarily litigated the medical aspects of Claimant's extent of disability. Nevertheless, in view of the conclusion that the claim asserted is not subject to the coverage of the Act, as amended in 1972, this further issue concerning the extent of Claimant's disability has not been reached and no findings or conclusions relative thereto have been made.

Findings of Fact

The Employer, Prolerized New England Company, operates a metal reprocessing business at Everett, Massachusetts. Scrap metal is purchased by Employer in the form of junk cars, refrigerators, etc. Sixty percent, or more, of Employer's Everett metal reprocessing business consists of the production of "Prolo" steel which results from the processing of automobiles, refrigerators, etc. through the "Prolo" Mill which breaks the metal into small pieces about the size of a man's fist. Upholstery, fabric, plastics, glass, etc. are separated; as are the various metals. The scrap automobiles, refrigerators, etc. are fed into the Mill, which is the heart of Employer's operation, by the 8-Y conveyor (so called because it is 8 feet wide) and Prolo steel leaves the Mill by another conveyor to stockpiles.

Heavier steel, known as No. 1 and No. 2, No. 1 being any metal thicker than about ¾ ', which makes up about forty per-

cent of Employer's business, is not processed through the Prolo Mill but, rather, goes to the Shear where it is cut into various lengths of less than four feet. After being processed through the Shear this scrap is also placed in stockpiles. The Prolo Mill is located in about the center of Employer's premises and the Shear is located in the extreme northeast corner (see, Comp. Exh. 1 which is an aerial photograph on which Employer's premises are outlined in red and the Mill and Shear are designated by appropriate letter).

Employer's property extends to the Mystic River where it has dock facilities and various equipment, including a large gantry which moves on rails and a device known as a ship loader which consists of a long fixed conveyor which extends back to the stockpile of the Prolo steel. Most, but not all, of the end product is transported by ships which are loaded at Employer's docks. Ships are loaded by machinery and a crew classified as "ship loaders" perform the loading operations and are paid a higher rate. When not engaged in loading vessels (generally, about one ship per month and when there was no ship one month there might be two the next month; loading required two to three days) the ship loading crew maintained and repaired the Ship Loader. Claimant was not classified as a "ship loader". All employees of Employer unit employees, about 65 in number, are represented by International Longshoremen's Association Local 1908, AFL-CIO.

Claimant was born April 17, 1934, is married and has four children living at home ranging in age from 7 to 18. Most of his training and work experience prior to employment by Employer was as a mechanic. He began work for Employer on February 12, 1973, as a maintenance man. His work for Employer involved the maintenance and repair of all company equipment and on occasion this required going aboard a ship docked at the company pier to repair equipment used in loading steel. Claimant, on occasion, also went aboard ships

to assist in positioning the collar over a hold and a chute into the collar prior to commencement of loading; and Claimant had, further, on occasion manned lines on the dock. However, as noted, Claimant was not classified as a ship loader and his regular duties did not involve going aboard ship unless some problem arose requiring the repair of equipment or additional employees were detailed to assist the ship loaders.

Normally, the Mill shuts down at 6:00 p.m. and regular maintenance is performed at night. Claimant had worked on the night maintenance shift for several months prior to his injury on August 21, 1975. On August 21, 1975, the Mill had shut down at 6:00 p.m.; Claimant reported to work at 5:30 p.m. in the millroom and was assigned to repair pins and wheels on the 8-Y conveyor. At about 11:20 p.m. he fell from the apron of the 8-Y conveyor, a drop at that point of about 15 feet, and seriously injured his right shoulder, arm and hand. Claimant was initially treated at Malden Hospital and surgery was subsequently performed by Dr. Leffert at Massachusetts General Hospital on March 30, 1976.

On August 21, 1975, there was no ship at the dock, nor had there been for at least two months prior to August 21, 1975. Claimant, at the time of injury, was engaged in normal maintenance work on the conveyor which transported the scrap automobiles, etc. into the Mill for processing into Prolo steel. The Mill itself is about 1000' from the docks and has nothing to do with shipment of the end product. To the contrary, it is a manufacturing process and its end product, Prolo steel, moves from the Mill to stockpiles.

Conclusions

Section 2(3) of the Act, as amended in 1972, defines "employee" as follows:

> "(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . ."

Section 3(a) — Coverage — of the Act, as amended in 1972, provides"

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.) . . .

Sophistry aside, Claimant was not a longshoreman nor was he engaged in any maritime employment when he was injured. To the contrary, when injured Claimant was engaged in his regular job as a maintenance man and was performing work on a conveyor which fed scrap automobiles, etc., into Employer's Mill which separated metal, glass, fabric, plastics and the like and converted the steel into small bits, known as Prolo steel which moved from the Mill by conveyors to stockpiles from which, to be sure, the great bulk eventually moved, by other equipment, into ships for transport. (Other metals and the by-product wastes of this operation, such as glass, fabrics and plastics, also moved from the Mill by other conveyors to stockpiles.) But there was no ship loading in progress on August 21, 1975, when Claimant was injured, and there

had been no ship loading for at least two months prior thereto. Loading was performed by employees classified as "ship loaders" who were paid a higher rate and Claimant was never classified, or paid, as a shiploader. As a maintenance man, Claimant had, at different times, worked on all of Employer's equipment, including equipment which loaded Prolo steel, as well as No. 1 and No. 2 steel into ships; had worked on the Shear; and had even worked aboard ships; but when injured Claimant was working on the 8-Y conveyor which fed scrap automobiles into the Mill. It is unnecessary to decide what might have been Claimant's status under the Act, as amended, had he been injured while working on equipment used by Employer in the loading of ships, or while working aboard ships, as Claimant, when injured, was performing normal maintenance work on a conveyor which began Employer's manufacturing, or reprocessing, operation, and both the language of the Act, as amended, and the decisions construing and applying the amended provisions of the Act, make it clear that coverage is governed by the nature of a claimant's employment at the time of his injury. In the instant case, Claimmant was not engaged in maritime employment when injured, he was not injured upon navigable waters, and his employment at the time of injury was wholly unrelated to the loading of any vessel. Thus, the Court of Appeals for the Fifth Circuit has held,

> "In light of these indicia of Congressional intent, we must agree with the Court of Appeals for the Ninth Circuit that the new Act requires such a claimant to have been engaged in the work of loading, etc. *at the time of the injury. Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 960 (9th Cir. 1975)." *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533, 539 (5th Cir. 1976), *petition for certiorari filed* February 23, 1977. (Emphasis supplied.)

The Court of Appeals for the First Circuit further stated, in *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir. 1976),

> ". . . That statement, as well as other parts of the committee reports, indicates that Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels (or else repaired or built them) and who fit such traditional maritime designations as longshoreman, harborworker, and the like. Thus, as indicated previously, we quite agree with the second circuit that clerks and other like terminal workers are excluded." (529 F.2d at 276).

And the Court of Appeals for the Third Circuit, in *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3rd Cir. 1976), stated:

> ". . . the overall intention appears to afford federal coverage to all those employees engaged in handling cargo after it has been delivered from another mode of transportation for the purpose of loading it aboard a vessel, and to all those employees engaged in discharging cargo from a vessel up to time it has been delivered to a place where the next mode of transportation will pick it up. . . . The limits of federal coverage is defined . . . by the location of the interface between the air land and the water modes of transportation." (540 F.2d at 638)
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> "The line which Congress intended to draw was between maritime commerce and land commerce, and the cover-

age of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employee engaged in the latter." (540 F.2d at 639).

* * * *

"The order of the Benefits Review Board will be set aside and the case will be remanded for a determination . . . as to whether *at the time of the injury Johns was engaged in maritime or non-maritime employment.*" (540 F.2d at 640) (Emphasis supplied.)

Coverage under the 1972 amendments to the Act has been comprehensively reviewed in various well reasoned decisions, including: *Jacksonville Shipyards, Inc.* v. *Perdue, supra*; *Stockman* v. *John T. Clark & Son of Boston, Inc., supra*; *Pittston Stevedoring Corporation* v. *Dellaventura*, 544 F.2d 35 (2nd Cir. 1976), *cert granted sub. nom.* (Nos. 76-444 and 76-454), December 6, 1976, 45 U.S. Law Week 3408, 3416; *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs, supra*; *Weyerhaeuser Company* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 45 U.S. Law Week 3254 (1976). The myriad cases which have struggled with the question of coverage under the 1972 amendments, including those set forth above, have, almost entirely, with the exceptions of *Weyerhaeuser Company, supra*, and *Perdue supra*, concerned variant facets of handling cargo, to a large extent involving some phase of containerization; but few cases, if any, have directly involved a manufacturing, or reprocessing, operation, such as Employer's. Inherent in Claimant's assertion of coverage is the contention that the whole of Employer's business is maritime in nature because the end product, reprocessed steel, is, from the initial purchase and delivery of junk steelj intended to be shipped by vessel. Such contention is contrary to the language of the Act and the ex-

pressed intent of Congress as well stated by the Court of Appeals for the First Circuit in *Stockman, supra,*

> ". . . that Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels . . . and who fit such traditional maritime designations as longshoremen, harborworkers, and the like." (529 F.2nd at 276).

If Claimant's position were correct, it would mean that all employees of all employers whose product is shipped largely, if not wholly, by barge or by vessel, for example, a refinery or a coal company, are engaged in maritime employment. Claimant's assertion wholly ignores the provisions of the Act and the intent of Congress and, as very well stated by the Court of Appeals in *Sea-Land Service, supra,* would be beyond the reach of admiralty jurisdiction under which the 1972 amendments were enacted; and wholly ignores the reality of Employer's operation. Claimant was a maintenance man whose duty was to maintain and repair equipment, some of which was used to load vessels; but Employer had ship loaders who loaded vessels and Claimant was never classified or paid as a ship loader. But more important, for several months prior to his injury Claimant had been assigned to the night maintenance shift; the Mill closed down daily at 6:00 p.m. and maintenance and repair activities were performed while the Mill was closed down; the ship loading crew, when not loading a ship, maintained the equipment known as the Ship Loader. (Under the union contract, employees classified as ship loaders received a slightly higher rate for all employment and were paid substantially more when actually loading a ship.) Claimant during the period he was assigned to the night maintenance shift also

changed filters on the Shear every Saturday morning. At the time of his injury, Claimant was working at the mill and Claimant had been so assigned for several months prior to August 21, 1975, the date of his injury. Thus, at the time of his injury, Claimant was employed in the manufacturing, or reprocessing, phase of Employer's operation which was wholly separate and distinct from the loading of vessels; and loading, when involved, was normally and regularly performed by employees other than Claimant. Even the equipment directly involved in the loading of vessels, e.g., the Ship Loader, was normally and regularly maintained by employees, ship loaders, other than Claimant. For a substantial period of time Claimant had not been engaged in any maritime employment, that is, had not been involved in loading any vessel and had not worked aboard any vessel; and quite clearly Claimant was not engaged in any maritime employment when injured on August 21, 1975.

A second implicit contention in Claimant's assertion of coverage is that because an employee has, on some occasion, performed maritime employment, and Claimant obviously had on occasion worked aboard vessels, all other activity is rendered maritime employment. Such contention has specifically been rejected. *Weyerhaeuser Company* v. *Gilmore, supra*; *Jacksonville Shipyards, Inc.* v. *Perdue, supra*; *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs, supra*.

Finally, Claimant's assertion that *Milton W. Shoemaker* v. *Schiavone & Sons, Inc.*, BRB No. 75-160, 2 BRBS 257 (1975), is controlling must be rejected. First, *Shoemaker* involved, in part, aggravation of a prior covered injury. Second, while *Shoemaker* involved an injury to an employee working on a shearer machine cutting scrap metal destined for export, the facts of the instant case, which clearly demonstrate that Claimant was injured while employed in the manufacturing,

or reprocessing, phase of Employer's operation which was entirely separate and distinct from its loading operation which was performed by employees other than Claimant, distinguish this case from *Shoemaker*. Third, following its decision in *Shoemaker* the Board has clearly stated that,

> "For coverage under this Act to exist, the function being performed must be related to waterborne transportation, the jurisdictional nexus, rather than land-based activities." *Murl J. Winchester* v. *Texports Stevedore Co.*, BRB No. 76-139, 4 BRBS 447 (1976).

As Claimant's function related wholly to land-based activities at the time of his injury, and had for several months prior thereto, there was no functional relationship of Claimant's employment to maritime transportation and his injury was not covered by the Act.

For the foregoing reasons, Claimant was not an employee within the meaning of Section 2(3) of the Act and compensation for his injury is not within the coverage of Section 3(a) of the Act. Accordingly, Claimant's claim must be denied as not within the coverage of the Act. Other issues raised, including the extent of disability, in view of this determination, have neither been reached nor decided. In view of the denial of the claim for compensation, the further claim of Claimant's attorney for the allowance of an attorney's fee, out-of-pocket expenses and costs must also be denied. *Director, Office of Workmen's Compensation Programs* v. *Hemingway Transport, Inc.*, BRB No. 74-129, 1 BRBS 73 (1974); *John Karacostas, Sr.* v. *Port Stevedoring Company, Inc.*, BRB No. 74-176, 1 BRBS 128 (1974).

ORDER

The claim of Claimant, Richard F. McNeil, be and the same is hereby, denied for lack of jurisdiction.

The claim of Claimant's attorney for allowance of an attorney's fee and cost be, and the same is hereby, denied for lack of jurisdiction.

/s/_____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 8, 1977
Washington, D.C.

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

RICHARD F. McNEIL Claimant-Petitioner v. PROLERIZED NEW ENGLAND COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	FILED AS PART OF THE RECORD MARCH 20, 1978 _____ (date) / s / _____ (Legal Clerk) Benefits Review Board BRB No. 77-328 & 77-328A DECISION

Appeal from the Decision and Order of William B. Devaney, Administrative Law Judge, United States Department of Labor.

David M. Wright (Atwood & Wright), Boston, Massachusetts, for the claimant.

Timothy F. Nevils (Sullivan & Cronin), Boston, Massachusetts, for the employer/carrier.

Linda L. Carroll (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chairman, and MILLER, Member.

MILLER, Member:

These are appeals by the claimant and Director, Office of Workers' Compensation Programs, from a Decision and Order (77-LHWCA-318) of Administrative Law Judge William B. Devaney pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, (hereinafter referred to as the Act).

Claimant, a member of the International Longshoremen's Association, was employed as a maintenance man by Prolerized New England Company (hereinafter referred to as employer). Employer operates a scrap metal reprocessing operation on a large piece of property adjacent to the Mystic River. It has its own shiploading equipment, gantries, and dock from which it loads most of the end product onto ships.

Employer's operation begins with the purchase of scrap metal. The process that employer uses in preparing the scrap metal depends on the nature of the steel purchased. However, about sixty percent of the scrap metal is processed by its mill into small pieces of metal the size of a man's fist, called "Prolo" steel. The scrap metal is fed into the mill, located in the center of employer's property, by an eight-foot wide conveyor, called the 8-Y conveyor. The prolo steel leaving the mill is dumped onto stockpiles by another conveyor. When the prolo steel is to be loaded, bulldozers push it onto a conveyor, called the shiploader, which carries it and dumps it into the holds of ships located alongside employer's dock.

The scrap metal not processed into prolo steel is cut by a machine, called the shearer, into small lengths of steel less than four feet long in order to fit into the holds of ships. After being cut, the lengths of steel are placed in stockpiles. Thereafter, trucks carry the scrap metal to the dock and employer's cranes load it onto the dockside ships.

Claimant was classified as a maintenance man and his duties involved the maintenance and repair of all company

equipment. Thus, claimant's duties occasionally required him to go aboard ships docked at employer's pier to repair equipment used in loading the processed scrap metal, to assist in the loading operation itself, and to man lines on the dock. However, when claimant signed in for work each day, he did not know to which part of employer's operation he would be assigned. On August 21, 1975, claimant was working the night shift and was assigned to replace the pins and wheels in the 8-Y conveyor leading into the mill. He fell about fifteen feet from the apron alongside the conveyor and seriously injured his right shoulder, arm and hand. He subsequently filed the current claim for benefits.

At the hearing, the administrative law judge determined the sole issue was whether claimant was covered under the Act. He concluded claimant was not covered since he was not engaged in maritime employment at the time of the injury according to Section 2(3) of the Act, 33 U.S.C. § 902(3), and was not injured on navigable waters according to Section 3(a) of the Act, 33 U.S.C. § 903(a). Although the nature and extent of claimant's disability was also raised by the employer and its insurance carrier, the administrative law judge did not reach this issue in view of his conclusion that claimant was not covered.

Claimant appeals on the grounds that the Decision of the administrative law judge is not supported by substantial evidence and is not in accordance with law. The Director, Office of Workers' Compensation Programs, appeals on the same grounds.

Upon its review of this case, the Board must affirm the decision of the administrative law judge if it is supported by substantial evidence, is not irrational, and is in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe* v. *Smith Associates*, 380 U.S. 359 (1965). We conclude that the Decision and Order of the administrative law judge is not supported by substantial

evidence and is not in accordance with law and therefore reverse and remand.

In finding that claimant was not engaged in maritime employment, the administrative law judge erroneously applied a "moment of injury" test under Section 2(3) of the Act, 33 U.S.C. § 902(3). Section 2(3) defines the term "employee" as

> . . . any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . .

The administrative law judge determined that an employee must be engaged in maritime employment at the time of his injury in order to be covered under the Act.

In its most recent decision on the subject, the Supreme Court has rejected this restrictive interpretation. *See Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. , 97 S.Ct. 2348 (1977), (hereinafter referred to as *Caputo/Blundo*). The Court emphasized that by means of the 1972 amendments, Congress intended to create a

> "uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S Rep, at 13, HR Rep, at 10-11 . . . . The Act focuses primarily on occupations — longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers, who, without the amendments, would be covered only for part of their activity.

97 S.Ct. at 2362.

Moreover, in discussing the "point of rest" theory, the Court declared

> . . . Petitioners fail to give effect to the obvious desire to cover longshoremen *whether or not their particular task at the moment of injury is clearly a longshoring operation*. The theory does not comport with the Act's focus on operations and its desire for uniformity. (emphasis added.)

97 S.Ct. at 2363. Finally, the Court noted that

> . . . It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend some of their time in indisputably longshoring operations and who, without the amendments, would be covered for only part of their activity.

97 S.Ct. at 2362. In addition, the Board has consistently rejected the "moment of injury" test. *See e.g., Mildenberger* v. *Cargill Inc.*, 2 BRBS 51, BRB No. 74-224 (July 3, 1975). Consequently, the administrative law judge's application of the "moment of injury" test is clearly not in accordance with law. *Accord, Stockman* v. *John T. Clark & Son of Boston*, 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 45 U.S.L.W. 3838 (June 28, 1977).

The appropriate test for determining whether an employee is engaged in maritime employment is not what the employee was engaged in at the time of his injury, but whether, in the case of loading vessels, the employee's responsibilities are an integral part of the loading process. *Cf. Caputo/Blundo, su-*

pra; *see also Mildenberger* v. *Cargill, Inc.*, *supra*; *Shoemaker* v. *Schiavone & Sons, Inc.*, 2 BRBS 257, BRB No. 75-160 (Sept. 5, 1975); *Vinciquerra* v. *Transocean Gateway Corp.*, 1 BRBS 523, BRB Nos. 75-125 and 125A (June 5, 1975).

In the instant case, the administrative law judge, in his findings, noted the following. Claimant's job responsibilities involved the maintenance and repair of all company equipment. This included the shearer machine, used in cutting the scrap metal to four-foot lengths in order to fit into the holds of ships, and the gantries and shiploader used in loading the scrap metal onto the dockside ships. Claimant was occasionally required to go aboard the ships docked at employer's pier to repair such equipment, to assist the loading operation, and he occasionally had to man lines on the dock. Furthermore, the claimant had on occasion operated the shearer machine. Nevertheless, the administrative law judge deemed these facts irrelevant in light of his application of the "moment of injury" test.

In *Vinciquerra, supra*, we held that a mechanic whose job was to maintain and repair machinery and vehicles used in loading and unloading vessels was engaged in maritime employment. The Board reasoned claimant's duties were essential to the movement of maritime cargo. *Accord, Stecz* v. *Sea-land Service, Inc.*, 6 BRBS 291, BRB No. 76-350 (July 5, 1977). In the same vein, an employee whose job was to sandblast a disassembled crane used in shipbuilding was also covered under the Act. *Kininess* v. *Alabama Dry Dock and Shipbuilding Co.*, 4 BRBS 13, BRB No. 75-275 (May 18, 1976), *aff'd*, 554 F.2d 176 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 299 (1977). Furthermore, the Board has held that a claimant who was injured while operating a "shearer" machine cutting scrap metal destined for export was covered. *Shoemaker, supra*. Although the claimant in *Shoemaker* had sustained a previous injury clearly covered under the Act, we

concluded that even if the accident in question was a separate injury, the claimant would be covered.

In light of *Caputo/Blundo*, *Vinciquerra*, *Kininess*, and *Shoemaker*, claimant was clearly engaged in maritime employment and covered part of his workday or workweek. Applying the "continuous coverage" reasoning of Congress and the Court in *Caputo/Blundo*, claimant clearly satisfies the status test of Section 2(3).

Moreover, we deem the administrative law judge's emphasis on claimant's job classification erroneous. In *Caputo/Blundo*, the Court rejected the employer's argument that claimant's membership in a carpenter's union indicated that claimant was not engaged in maritime employment. In the same vein, we reject the argument that claimant's job classification as maintenance man is dispositive of his status under Section 2(3) of the Act. Further, the administrative law judge's strong reliance on *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976), *vacated and remanded sub nom., Director, O.W.C.P.* v. *Jacksonville Shipyards, Inc.*, 432 U.S., 97 S.Ct. 2697 (1977), and *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976), is clearly misplaced in view of *Caputo/Blundo*.

Accordingly, the Decision and Order of the administrative law judge with respect to claimant's status under the Act is neither in accordance with law nor supported by substantial evidence and therefore reversed.

The administrative law judge also found the claimant did not satisfy the situs test in that he was not injured over navigable waters under Section 3(a) of the Act, 33 U.S.C. § 903(a). The situs requirement of Section 3(a) is met if the injury occurs ". . . upon the navigable waters of the United States (including an adjoining pier, . . . or other adjoining area customarily used by an employer in loading, . . . a vessel)." The conclusion of the administrative law judge that claimant

did not satisfy the situs test is not in accordance with law. *See Caputo/Blundo, supra*; *Kininess* v. *Alabama Dry Dock & Shipbuilding Company, supra*; *Vinciquerra* v. *Transocean Gateway Corp., supra*. In *Kininess*, we stated that "the Board will not narrowly construe the term 'adjoining area' to restrict the situs of an injury to an area immediately adjacent to navigable waters." *Kininess* at 15. Claimant's injury was sustained at a site immediately next to the mill and near the dock and loading facilities adjacent to the Mystic River. It follows that claimant was injured on an adjoining area customarily used by an employer in loading a vessel.

Claimant's Petition for Review requests an award of an attorney's fee. However, claimant's attorney has not submitted to the Board an itemized statement as required by Section 28 of the Act, 33 U.S.C. § 928, and the applicable Rules and Regulations. To satisfy the requirements of 20 C.F.R. §§ 702.132 and 802.203, claimant's attorney must submit a complete statement of the extent and character of the necessary legal services rendered before the Board, including the type of work performed, the date, the number of hours worked on that day and whether the work was performed by an attorney, a paralegal or a law clerk. Such request must be submitted within 30 days from receipt of this Decision. The employer has ten days from receipt of the claimant's fee request to respond to it.

Therefore, the claimant was engaged in maritime employment according to Section 2(3) of the Act and was injured on navigable waters according to Section 3(a) of the Act. The Decision and Order of the administrative law judge is reversed and the case remanded for further proceedings consistent with this opinion.

/s/_____
JULIUS MILLER, Member

I concur:
/s/_____
SAMUEL J. SMITH, Chairman

Dated this 20th day
of March, 1978

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of RICHARD F. McNEIL Claimant v. PROLERIZED NEW ENGLAND COMPANY Employer and HARTFORD ACCIDENT AND INDEMNITY COMPANY Carrier	Case No. 77-LHCA-318 OWCP No. 1-21767 FILED AS PART OF THE RECORD November 28, 1978 (date) /s/ _____ (Clerk) Benefits Review Board

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and Carrier

Before: WILLIAM B. DEVANEY
Administrative Law Judge

Supplemental Decision and Order on Remand

Statement of the Case

The initial Decision and Order in this matter, dated April 8, 1977, and filed in the Office of the Deputy Commissioner on April 19, 1977, had denied the claim of Claimant, Richard F. McNeil, for lack of jurisdiction, it having been found that Claimant's function related wholly to land-based activities at the time of his injury, and had for several months prior thereto, and that, as there was no functional relationship of Claimant's employment to maritime transportation, his injury was not covered by the Act. Accordingly, Claimant was not an employee within the meaning of Section 2(3) of the Act and compensation for his injury was not within the coverage of 3(a) of the Act.

Appeals were filed by the Claimant and by the Director, Office of Workers' Compensation Programs, and the Benefits Review Board, BRB Nos. 77-328 and 77-328A, in a Decision dated March 20, 1978, reversed the Decision and Order of the Administrative Law Judge and remanded for further proceedings consistent with its opinion, the Board having held that Claimant "was engaged in maritime employment according to Section 2(3) of the Act and was injured on navigable waters according to Section 3(a) of the Act." Employer and Carrier on May 23, 1978, filed a Petition for Review of an Order of the Benefits Review Board in the United States Court of Appeals for the First Circuit, Case No. 78-1210, which was dismissed for lack of jurisdiction, the Petition not having filed within sixty days as required by Section 21(c) of the Act, 33 U.S.C. § 921(c), by Order entered June 13, 1978 (certain dates being corrected by Order entered June 19, 1978). Thereafter, on June 29, 1978, the Benefits Review Board remanded to this Office a portion of the record and on July 13, 1978, remanded the re-

mainder of the record, and in particular the Exhibits. For reasons not apparent, the undersigned did not receive the portion of the record remanded on July 13, 1978, until July 27, 1978.

By letter dated July 28, 1978, made part of the record at the subsequent hearing as ALJ Exh. 1-R,[1] I advised the parties that my review of the record indicated one, or more, areas of uncertainty which, unless resolved, might require a further evidentiary hearing. The questions which did not appear to have been fully resolved on the original record were: a) Is it contended that Claimant's injury is a scheduled injury under Sections 8(c)(1) and (19) of the Act? b) Do the parties, or does either party, contend that Claimant's condition had become permanent? If so, what degree of permanent disability is claimed, when is it claimed that the disability became permanent, and what evidence is relied upon to support such claim? If permanent total disability were claimed and proved, is Section 8(f) of the Act asserted? c) Is claimant requesting consideration of post-hearing medical evaluations, this inquiry being prompted by i) counsel for Claimant's assertion contained in his letter dated June 26, 1978; and ii) the statement by the Board in *James W. Rogers* v. *PAL Services and Travelers Insurance Company*, BRB No. 77-636 (May 26, 1978), that ". . . since we are already remanding this case to the administrative law judge . . . we feel it within the policy of swift adjudication of claims under the Act and in the interests of justice to grant claimant's motion. Accordingly, the administrative law judge is directed to receive and consider this evidence on remand." It was pointed out that *PAL Services* was distinguishable for the reason that no comparable motion had been made in the instant case to the Board; nevertheless, the principle seemed equally applicable where matters are

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[1] The letter "R" identifies Exhibits introduced at the hearing on remand.

called to the attention of this Office in connection with further proceedings on remand. Indeed, in a sense, that this was already implicit in the questions above, namely, what is the extent of disability claimed; and d) Does the testimony of Dr. Leffert that ". . . in addition to the shoulder problem, that he [Claimant] . . . now has a severe C-5, 6 radiculopathy" indicate, if it does not require a finding, that Claimant's disability remains temporary in character rather than permanent, whatever the degree of disability, in light of Dr. Leffert's further testimony that, ". . . He's got it and it bothers him at this point in time".

August 11, 1978, was fixed as the date for the parties to mail their response and the parties were advised that, if it should appear, on the basis of the responses, that a further evidentiary hearing was necessary, the hearing would be set for the week of August 28, the precise date to be determined by the desires of the parties.

Counsel for Claimant responded by letter dated August 14, 1978, and did request a further evidentiary hearing (ALJ Exh. 2-R); and Notice of Hearing on Remand issued August 21, 1978, for hearing on August 30, 1978, pursuant to which a hearing was duly held before the undersigned on August 30, 1978, in Boston, Massachusetts. At the hearing, both parties, on the record, waived the provision of Section 19(c) of the Act and at the request of the parties and for good cause shown the date for the filing of post-hearing briefs was fixed as September 25, 1978. By letter dated September 19, 1978, and received by this Office on September 22, 1978, counsel for Claimant, with consent of counsel for Employer-Carrier, requested and for good cause shown was granted a further extension of time for the filing of briefs to October 6, 1978.

All parties were represented by counsel at the hearing on remand, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing

on the issues involved. Claimant was present but was not called as a witness by either party. The testimony consisted entirely of the direct and cross-examination of Dr. Bernard Yudowitz. In addition, the parties re-affirmed their prior stipulation that Claimant's average weekly wage for the year proceeding the injury was $410.00 per week; counsel for Claimant stipulated that Claimant's injury was a scheduled injury within the meaning of Section 8(c)(1) and (19) of the Act (see, ALJ Exh. 2-R), further asserts total permanent disability under Section 8(a) of the Act; and counsel for Employer-Carrier was advised that a penalty under Section 14(e) of the Act was sought, it being contended that the notice of controversion (ALJ Exh. 2) was not filed within 14 days after notice of the injury. Of course, the record of the initial hearing, of March 23, 1977, is part of the record herein and both the hearing on remand and the decision and order on remand are merely supplemental to the initial hearing and the initial decision and order. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following decision and order:

Coverage Under the Act

The Decision and Order herein dated April 8, 1977, set forth detailed Findings of Facts and Conclusions in which, *inter alia*, I found that:

> ". . . Ships are loaded by machinery and a crew classified as 'ship loaders' perform the loading operations and are paid a higher rate. When not engaged in loading vessels . . . the ship loading crew maintained and repaired the Ship Loader. Claimant was not classified as a 'ship loader'. All employees of Employer unit employees,

about 65 in number, are represented by International Longshoremen's Association Local 1908, AFL-CIO. (Decision and Order, p. 4)

". . . He [Claimant] began work for Employer on February 12, 1973, as a maintenance man. His work for Employer involved the maintenance and repair of all company equipment and on occasion this required going aboard a ship docked at the company pier to repair equipment used in loading steel. Claimant, on occasion, also went aboard ships to assist in positioning the collar over a hold and a chute into the collar prior to the commencement of loading; and Claimant had, further, on occasion manned lines on the dock. However, as noted, Claimant was not classified as a ship loader and his regular duties did not involve going aboard ship unless some problem arose requiring the repair of equipment or additional employees were detailed to assist the ship loaders.

"Normally, the Mill shuts down at 6:00 P.M. and regular maintenance is performed at night. Claimant had worked on the night maintenance shift for several months prior to his injury on August 21, 1975. On August 21, 1975, the Mill had shut down at 6:00 P.M.; Claimant reported to work at 5:30 P.M. in the millroom and was assigned to repair pins and wheels on the 8-Y conveyor. At about 11:20 P.M. he fell from the apron of the 8-Y conveyor, a drop at that point of about 15 feet, and seriously injured his right shoulder, arm and hand. . . .

"On August 21, 1975, there was no ship at the dock, nor had there been for at least two months prior to August 21, 1975. Claimant, at the time of injury, was engaged in normal maintenance work on the conveyor which transported the scrap automobiles, etc. into the

Mill for processing into Prolo steel. The Mill itself is about 1000' from the docks and has nothing to do with shipment of the end product. To the contrary, it is a manufacturing process and its end product, Prolo steel, moves from the Mill to stockpiles. (Decision and Order, pp. 4-5).

I concluded, *inter alia*, that,

"Sophistry aside, Claimant was not a longshoreman nor was he engaged in any maritime employment when he was injured . . . Claimant was not engaged in maritime employment when injured, he was not injured upon navigable waters, and his employment at the time of injury was wholly unrelated to the loading of any vessel. . . ." (Decision and Order, p. 6)

* * * *

"Claimant was a maintenance man whose duty was to maintain and repair equipment, some of which was used to load vessels; but Employer had ship loaders who loaded vessels and Claimant was never classified or paid as a ship loader. But more important, for several months prior to his injury Claimant had been assigned to the night maintenance shift . . . the ship loading crew, when not loading a ship, maintained the equipment known as the Ship Loader. (Under the union contract, employees classified as ship loaders received a slightly higher rate for all employment and were paid substantially more when actually loading a ship.) Claimant during the period he was assigned to the night maintenance shift also changed filters on the Shear every Saturday morning. At the time of his injury, Claimant was working at the mill and Claimant had been so assigned for several months prior to

August 21, 1975, the date of his injury. Thus, at the time of his injury, Claimant was employed in the manufacturing, or reprocessing, phase of Employer's operation which was wholly separate and distinct from the loading of vessels; and loading, when involved, was normally and regularly performed by employees other than Claimant. Even the equipment directly involved in the loading of vessels, e.g., the Ship Loader, was normally and regularly maintained by employees, ship loaders, other than the Claimant. For a substantial period of time Claimant had not been engaged in any maritime employment, that is, had not been involved in loading any vessel and had not worked aboard any vessel; and quite clearly Claimant was not engaged in any maritime employment when injured on August 21, 1975." (Decision and Order, p. 9).

* * * *

"As Claimant's function related wholly to land-based activities at the time of his injury, and had for several months prior thereto, there was no functional relationship of Claimant's employment to maritime transportation and his injury was not covered by the Act. (Decision and Order, p. 10).

Accordingly, I concluded that Claimant was not an employee within the meaning of Section 2(3) of the Act and compensation for his injury is not within the coverage of Section 3(a) of the Act, and the claim of the Claimant was, therefore, denied for lack of jurisdiction.

The Benefits Review Board, BRB Nos. 77-328 and 77-328A (March 20, 1978), disagreed and reversed and remanded. I cannot, and do not, concur in, adopt, or make as my findings or conclusions those of the Board. Whether the Board's decision and/or its review was in accordance with the provisions

of Section 21(b)(3) of the Act, as amended, 33 U.S.C. § 921(b)(3), *I.T.O. Corporation of Baltimore* v. *Benefits Review Board, U.S. Department of Labor*, 529 F.2d 1080, 1093 (4th Cir. 1975); *Todd Shipyards Corporation* v. *Director, OWCP*, 545 F.2d 1176, 1178 (9th Cir. 1976); *Tampa Ship Repair & Dry Dock Co., Inc.* v. *Director, OWCP*, 535 F.2d 936, 937-938 (5th Cir. 1976); *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 270 (1st Cir. 1976); see, also, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *O'Keefe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965), is a matter properly for resolution elsewhere. For all the reasons set forth in the Decision and Order of April 8, 1977, expressly incorporated herein by reference and which are fully confirmed and adopted as part of this Supplemental Decision, I find that Claimant was not an employee within the meaning of Section 2(3) of the Act and that compensation for his injury is not within the coverage of Section 3(a) of the Act.

Nevertheless, I am constrained by the Board's decision and order of remand to enter a compensation order in favor of Claimant as the Board has concluded that,

> ". . . the claimant was engaged in maritime employment according to Section 2(3) of the Act and was injured on navigable waters according to Section 3(a) of the Act. The Decision and Order of the administrative law judge is reversed and the case remanded for further proceedings consistent with this opinion." (BRB Nos. 77-328 & 328A).

Findings

1. Claimant, at the March 23, 1977, hearing, testified that he had not worked since his injury on August 21, 1975. The

night of the accident, August 21, 1975, Claimant was taken to Malden Hospital and was initially treated by Dr. Goguen, who was on emergency service. Claimant's shoulder was set by Dr. Goguen and Claimant remained under Dr. Goguen's care until the end of 1975 or January, 1976, when he was referred to Dr. Leffert at Massachusetts General Hospital. Prior to referral to Dr. Leffert, Dr. Goguen had sent Claimant to the Rehabilitation Center in Stoneham for therapy to keep his right arm mobile.

2. An operation was performed by Dr. Leffert on Claimant's shoulder, the medical aspects of which were fully described by Dr. Leffert, and Claimant testified that after surgery he experienced some improvement; that it "wouldn't grind"; but that his right shoulder, neck and arm still hurt. He testified that he can raise his right arm, and so demonstrated in the courtroom, but stated that raising his right arm to a not quite vertical position hurt; that he can lift up to five pounds with his right arm; that he exercised at home as instructed by Dr. Leffert; that he can write, can use some small tools if there is no pressure on the shoulder; but cannot put pressure on a screwdriver up high; that use of his right arm produces pain. He stated that he can drive an automobile but that if he drives for any length of time his arm becomes numb. Claimant testified that he had problems with his small finger, the ring finger and the middle finger; that he had very little sensation in those fingers, not even to cold or heat; that, although he is right handed, he has had to learn to shave with his left hand. Prior to the accident of August 21, 1975, Claimant had full and unrestricted use of his right arm and had experienced no loss of feeling in his fingers.

3. Claimant has four children. The oldest child was 18 in September, 1976; was graduated from high school in June, 1976; and was not in school at the time of the initial hearing, March 23, 1977.

4. Claimant testified that he obtained a hunting license in 1976; that he had owned a rifle (308) and a 12 gauge shotgun for several years; that he had the stock of the rifle cut down approximately an inch and a quarter to feel comfortable on his arm; that "The recoil from the 308 was so tremendous that I won't ever go near it again"; and that "he used light trap loads in the 12 gauge shotgun and couldn't even stand that on his shoulder." From Claimant's testimony, the inference is clear and unmistakable that Claimant, in 1976, fired both the rifle and the shotgun; but assuming that there was some trauma from shooting, Dr. Leffert testified that,

> "It would be highly unlikely [to affect his opinion as to the cause of Claimant's condition] unless he was firing a seventy-five millimeter cannon to produce this type of injury to the nerve roots . . . the narrowing that now shows up . . . the narrowing of the cervical spine could, in no way, be attributable to firing a shotgun."

5. While employed by Employer, Claimant had had three prior injuries to his right arm; he had received Workmen's Compensation from the Commonwealth of Massachusetts as to each of these injuries; and Claimant received compensation under the Massachusetts Compensation Act as to the present injury, "Effective August 21, 1975 and continuing at the weekly compensation rate of a hundred and twenty-five dollars which consisted of ninety-five dollars compensation plus thirty dollars for dependents under the Massachusetts Compensation Act" (ALJ Exh. 4). Claimant testified that the Massachusetts Compensation payment for dependents had been reduced by $6.00 since September, 1976, when the oldest child attained the age of 18, making the total weekly compensation $119.00 per week since September 15, 1976.

6. Dr. Robert D. Leffert, visiting orthopedic Surgeon and Chief of the Department of Rehabilitative Medicine and the Surgical Upper Extremity Rehabilitation Unit, Massachusetts General Hospital, testified that he first saw Claimant, upon referral by Dr. Goguen, January 12, 1976; that he took a history, performed a physical examination and ordered radiographs of Claimant's shoulder; that Claimant had a history of injuries to his right shoulder, and physical signs of severe derangement of his right shoulder as well as a nerve injury to the right upper extremity.

7. Dr. Leffert testified, referring to his report of January 15, 1976, to Dr. Goguen (Cl. Exh. 13), that his examination revealed that:

> "'Although there are no motor weaknesses in the limb, he did have hypesthesia and hypalgesia over the lateral aspect of the brachium and of the little and ring fingers.'"

which he stated, in English means "that he had numbness in the limb and that was demonstrable by means of neurological testing. So, this is a pathological finding that one wouldn't ordinary expect and this is related to his injury." Dr. Leffert further testified, referring to his letter,

> "'I believe that with his fracture dislocation of the shoulder he sustained an infraclavicular brachia plexus injury presently manifest as sensory loss over the lateral brachium and medial three fingers.' So, this was not an uncomplicated shoulder injury but one which produced nerve injury as well."

8. Dr. Leffert recommended that the condition should be rectified, or an attempt be made to rectify it, surgically; he

performed an operation, known as an "Acromioplasty", on the shoulder on March 30, 1976, which he described as follows:

> ". . . what I did was to incise the shoulder so that we could look inside and see where the impingement or the mechanical rubbing that had been taking place and which was obvious, clinically, was taking place and there were many adhesions and a ligament which is normally present in the shoulder had been rubbed so much that it was no longer present. It had simply been rubbed away. He had marked restriction of motion before the operation and at the operating table, it was possible to see, directly, where the bones were rubbing together and why they were causing so much discomfort. When he had his x-ray pre-operatively, it was noted that he had a slightly displaced fracture due to this injury and the bone was actually rubbing and required removal of bone to correct the pressure that was occurring. And so, what I did was to remove a portion of the clavicle and also the under surface of his acromium bone so that there would not be this rubbing and, in addition, I broke many of the soft tissue adhesions that had occurred because of inflammation in the shoulder and which were keeping his shoulder from moving. It was a very extensive procedure which was necessitated by a very severely involved joint."

9. Dr. Leffert testified that the condition was consistent with motion of the shoulder since August 21, 1975; that the displacement fracture, which occurred August 21, 1975, altered the humeral head "so that it now had a bump on it and every time he attempted to pick his arm up, this bump would impinge against the ligament" and "the bone had actually sawed across this ligament and eventually frayed it to the point where it was not recognizable."

10. Dr. Leffert testified that Claimant's shoulder "is not normal and it won't function normally even though he has good motion and even though he is greatly relieved of the discomfort that he had."; that, in his opinion, Claimant cannot perform the work of a maintenance man or mechanic or a truck driver; that Claimant will never be able to go back to heavy work; that Claimant could do things at table level without any heavy lifting; that Claimant could do light functions; that in March, 1977, he found that Claimant's range of motion approached normal and that Claimant reported doing more tasks at home which he, Claimant, described as minor repairs that did not require overhead work or heavy work.

11. In his letter of January 20, 1977, to Dr. Goguen, Dr. Leffert noted,

> "I believe that in addition to the shoulder problem, that he had, he now has a severe C-5, 6 radiculopathy"

A radiculopathy being described by Dr. Leffert as "a condition involving nerve roots and he had increased complaints of pain which he attributed to the nerves supplying his arm." Dr. Leffert stated, "he also had nerve damage which was attributable to his injury and since all of these nerves are very close together, it's virtually impossible to separate which caused what. The two sources are the original stretch injury on his nerves when he dislocated his shoulder and the possibility of injury to his cervical spine at the same time. There was no question that he had pain due to a neurological problem. He had had a neurological injury when this whole thing started." When asked whether both the shoulder condition and the radiculopathy were reasonably connected with the injury of August 21, 1975, Dr. Leffert replied:

> "I believe they are except that one cannot be absolute in this. I think it's a reasonable formulation. The man had

a lot of pain and it was of neurological origin in addition to the mechanical problem that he had in his shoulder."

12. As to the future course of the disease of the nerve roots, the radiculopathy, Dr. Leffert stated:

> "Well, I wish I were provided with a crystal ball to be able to say, absolutely, what's going to happen with this. Unfortunately, nerve injuries of this type tend to have chronic sequelae and its very difficult, if not impossible, to say whether this will quiet down and go away or whether it will continue to bother him . . . He's got it and it bothers him at this point in time."

13. Dr. Leffert's response to the question as to whether Claimant had reached maximum medical recovery was as follows:

> "I believe that he is still evolving in terms of his ultimate state . . . I don't see any surgical approach . . . However, in general, patients who undergo acromioplasty take a very long time to reach their maximum potential and a year is not . . . a long period for this to occur. I would not anticipate operating on Mr. McNeil's shoulder. However, I should think that probably within a short period of time, you could say that his shoulder had reached the point.

14. Employer-Carrier presented no evidence or testimony as to the availability of any jobs which it asserts Claimant can perform, although being advised that the burden of proof lies

with Employer-Carrier if reliance is placed on the availability of other work.

15. Dr. Bernard Yudowitz, Associate Professor of Psychiatry, Harvard Medical School, Director of the Institute for Law and Psychiatry at McLean Hospital, and Director of Psychiatry and Co-Director at the New England Rehabilitation Hospital, Woburn, Massachusetts, testified at the hearing on remand. Dr. Yudowitz developed and is Co-Director of a 20-bed unit in the New England Rehabilitation Hospital devoted entirely to the diagnostic evaluation and treatment of patients with chronic pain syndromes which have not responded to other forms of treatment. This unit is called the "Pain Unit" and Claimant was referred to Dr. Yudowitz's Pain Unit on June 5, 1978, by Dr. Leffert.

16. Dr. Yudowitz testified that Dr. Leffert referred Claimant,

> ". . . to rehabilitate him to a point of being able to function. Mr. McNeil was seen by Dr. Leffert as non-functional, extremely depressed, having had no relief from the surgical procedures or physical manipulations that had been previously done to his shoulder."

17. Claimant upon admission presented a history of severe headaches following the accident of August, 1975, which were so severe that Claimant was not oriented at the time of the headaches; neck pain radiating down into both shoulders which rendered his neck immobile in terms of turning his head from side to side; and a general and severe state of depression which rendered him sitting at home, staring at walls for hours, and concomitant with that temper outbursts, after which he became very remorseful and even more depressed. This had

been a continuing cycle that had continued month after month with no relief from anything that Dr. Leffert could prescribe.

18. Dr. Yudowitz testified that upon examination, when Claimant's head was moved actively by himself or others there was pain elicited from him. Also, there was difficulty in terms of the overextension of the right arm and right shoulder movement. Other physical findings, in terms of vital signs or general physical condition, were good and normal for a 44 year old man; that on the basis of the general examination and his continuous evaluation on a four day a week basis since Claimant's admission, he felt, and others on the staff felt, that there was in fact a radiculopathy which was consistent with the pain he showed. Dr. Yudowitz stated that a radiculopathy meant "that when there has been a disturbance of the vertebrae in the column and in this case the upper ones, the nerve roots which come out of the vertebrae are affected in some way. In this case not affected to the extent that they're severed, but perhaps the nerve sheaf becoming inflamed, swollen, thereby putting pressure on the nerve roots in a disalignment (sic), slight, of the vertebrae so that movement instead of being easy and fluid causes a misalignment, therefore also putting pressure on even touching the nerve roots which will cause pain where ever the end roots are. . . ." Dr. Yudowitz termed Claimant's radiculopathy as severe.

19. Dr. Yudowitz further testified that

> ". . . At times, in my opinion, Mr. McNeil suffers from what I can term a psychotic depression."

Dr. Yudowitz also stated that Claimant suffers from "paranoid psychotic depression."

20. Dr. Yudowitz testified that, in his opinion, Claimant's psychotic depression was causally related to the injury of

August 21, 1975; that the records, from the date of the accident to the surgical procedures and manipulations performed to the time he was referred to Dr. Yudowitz, all refer directly to the condition beginning after the accident of August 21, 1975.

21. Dr. Yudowitz testified that the Audiology Department at New England Rehabilitation Hospital had performed tests on Claimant's hearing which indicate nerve ending damage in the middle and inner ear over a period of time from loud noises; that he did not know what caused it but it is the type of damage to the ear that comes from a chronic loud noise situation; and that the hearing loss came on him "within the past year."

22. The program at the Pain Unit is both intense and highly structured. Briefly, it includes an intensive course in physical therapy; a program of occupational therapy; a program of movement therapy; and a program of psychotherapy.

23. Dr. Yudowitz testified that Claimant "functions educationally in terms of reading and writing at approximately a fifth grade level, and needing intensive remedial work there. In areas that would relate specifically to a task where he would be able to practice and read up on instruction and manuals and so forth, he would score very highly there, but in general ability for reading and writing he had an educational deficit and not an intellectual one. . . ."

24. Dr. Yudowitz testified that Claimant's return to the type of employment he previously had is out of the question; but Claimant "is capable of doing some work" provided it does not involve any manipulation in terms of shoulder, arms, radical neck movements, uncomfortable or unusual positions, and is not stressful. Claimant's vocational evaluation showed, for example, that he could be qualified for reading x-rays of welding joints which would draw on his previous experience

and would be a non-stressful situation; however, the occupational therapy at the bench test has been directed only to see the concentration he is able to maintain in a task over a period of time and the ability to bend down, etc., and Claimant is at the stage that his concentration is compromised at the present time so that it was not felt wise or worthwhile to test him for specific jobs.

25. Dr. Yudowitz testified

> ". . . with the educational deficit, with the psychological state today, right now, I would not say Mr. McNeil was ready for work right now."

Dr. Yudowitz repeated that at the present time Claimant is totally disabled from doing any work. Dr. Yudowitz stated that Claimant is a highly motivated man for work; he believed the depression could be treated, that the radiculopathy can diminish and that with proper training and some remedial catching up on intellectual deficits Claimant could work in non-stressful situations which did not require lifting, etc.; but there would be the problem of a 44 year old man in a difficult job market at the present time.

26. Specifically, as to whether Claimant had reached a medical end result, Dr. Yudowitz testified:

> "Q. And with respect to — Has Mr. McNeil reached a medical end result regarding his treatment?
> "A. A medical end result.
> "Q. Right.
> "A. No.
> "Q. He's still getting physiotherapy, which is a physical treatment for his problem?
> "A. Yes.

"Q. He's still getting occupational therapy, which is a physical treatment for his physical problem?
"A. Yes.
"Q. And this is not completed in the medical end result so that there is future treatment anticipated, expected and prescribed?
"A. Yes.

Earlier, Dr. Yudowitz had testified as follows:

"Q. Okay. Now, what is the scheduled future treatment of Mr. McNeil? Is he still undergoing intensive treatment in your facility?
"A. He is, sir.
"Q. And that (sic) duration of that would be indefinite?
"A. No, sir.
"Q. It's not indefinite"
"A. It's not indefinite.
"Q. Is there a schedule in point?
"A. Well, it depends on rate of improvement, sir. We don't keep someone forever.

27. Dr. Yudowitz stated that reports in Claimant's medical file showed other accidents in prior years, that is, prior to August 21, 1975, involving his shoulder; back, with disc surgery; and some indication of degenerative disc problems associated with aging; but Dr. Yudowitz testified that none of these conditions was related to the radiculopathy because there was functioning after each previous injury. Dr. Yudowitz stated that, in his opinion, the radiculopathy and the depression were caused by the accident of August 21, 1975; and, further, that in his opinion the prior injuries and degenerative condition had not made Claimant's present condition

any more severe than if there had been only one injury to Claimant's shoulder in 1975.

Conclusions

There is no doubt or dispute whatever that as a result of the injury of August 21, 1975, Claimant has been rendered permanently disabled from performing his regular employment. Thus, Dr. Leffert testified that Claimant's shoulder "is not normal and it won't function normally even though he has good motion and even though he is greatly relieved of the discomfort that he had"; that, in his opinion, Claimant cannot perform the work of a maintenance man, a truckdriver, or a mechanic; that Claimant will never be able to go back to heavy work. Dr. Yudowitz testified that Claimant's return to the type of employment he previously had is out of the question. Claimant testified that he can lift five pounds with his right arm; that he can not exert any pressure with his right arm; and that he cannot do even light work above his head with his right arm.

A. *Claimant Has Not Reached Maximum Medical Recovery*

Dr. Leffert testified that Claimant could do things at table level which did not involve heavy lifting or strain; however, he noted that in addition to the shoulder problem, Claimant had a severe C-5, 6 radiculopathy, a condition involving nerve roots, and that "He's got it and it bothers him at this point in time." Employer-Carrier presented no evidence at the initial hearing of March 25, 1977, of any actual job opportunities available to Claimant and Dr. Leffert's testimony, in part because he had not fully recovered from the surgical procedures and in part because of the severe radiculopathy, did not establish that Claimant was physically able, as of March 23,

1977, to perform work even if other actual jobs had been shown to have been available. Accordingly, the record shows that as of March 23, 1977, Claimant was totally and permanently disabled from performing his regular employment and Employer-Carrier failed to show any actual job opportunities available to Claimant which Claimant was capable of performing, *Hezekiah McCray* v. *Ceco Steel Co., et al.*, BRB No. 76-405, 5 BRBS 537 (1977); *Brown* v. *Martin Terminal, Inc.*, BRB No. 74-177, 1 BRBS 212 (1971); *Perini* v. *Heyde*, 306 F. Supp. 1321 (D. R.I. 1964).

However, Dr. Leffert testified that, as of March 23, 1977, Claimant had not reached maximum medical recovery. Thus, Dr. Leffert testified,

> "I believe that he is still evolving in terms of his ultimate state . . . in general, patients who undergo acromioplasty take a very long time to reach their maximum potential and a year is not a long period for this to occur . . . I should think that probably within a short period of time you could say that his shoulder had reached the point."

As to the radiculopathy, Dr. Leffert testified,

> "Unfortunately, nerve injuries of this type tend to have chronic sequelae and its very difficult, if not impossible, to say whether this will quiet down and go away or whether it will continue to bother him . . . He's got it and it bothers him at this point in time."

As of March 23, 1977, Dr. Leffert did not believe that Claimant had reached the point of maximum medical recovery. Upon referral to Dr. Yudowitz, Claimant was reported by Dr. Leffert as non-functional, extremely depressed, having no relief from the surgical procedures or physical ma-

nipulations that had previously been done to his shoulder; upon admission by Dr. Yudowitz, Claimant presented a history of severe headaches, neck pain radiating down into both shoulders, and a severe state of depression; and upon examination, Dr. Yudowitz fully confimed that Claimant suffers from a severe radiculopathy and a psychotic depression. Again, there is no question that Claimant is permanently disabled from his prior employment, or any similar employment involving heavy labor; that Claimant functions educationally in terms of reading and writing at approximately a fifth grade level, which is an educational deficit and not an intellectual deficit; and that Claimant could be qualified for non-stressful work, such as reading x-rays of welding joints. However, Dr. Yudowitz testified that, in his opinion because both the physical problems (pain) and the psychological state, Claimant is not now ready for work. Accordingly, the record again shows that Claimant is now totally disabled from doing any work.

But as to whether Claimant had reached a medical end result regarding his treatment, Dr. Yudowitz was clearly and emphatically of the opinion that Claimant has not reached a medical end result; that he is actively receiving physicotherapy, and occupational therapy; that the duration of such treatment is not indefinite, but is dependent on rate of improvement; and that Claimant is highly motivated for work. I am aware that when asked whether Claimant had reached maximum medical recovery, Dr. Yudowitz testified that in terms of the shoulder he had reached maximum medical recovery; but as to the depression, Dr. Yudowitz stated "I would hope psychologically he can recover much more" and as to the radiculopathy and neck pain and so forth, "I don't think I can give a firm opinion on that. I think that usually those are a long and drawn out situation." In terms of "maximum medical recovery" as used under the Act I find no essential or material difference from Dr. Yudowitz' "medical end result."

Under either term, the controlling consideration is whether Claimant has reached a point of maximum recovery. It appears that Claimant has reached the point of maximum medical recovery from the acromioplasty; but that he has not reached the point of maximum medical recovery from either the radiculopathy or the depression, for which Claimant is receiving active and intensive treatment. Dr. Yudowitz made it clear that continuation of the present course of treatment is determined by progress. Claimant has shown progress and until such time as he ceases to show progress from a definite course of treatment I cannot conclude that he has reached maximum medical recovery. Stated otherwise, I conclude that "medical end result" means "maximum medical recovery" and as Claimant has not reached a medical end result he has not reached maximum medical recovery.

At the time of the initial hearing, Dr. Leffert testified that, in his opinion, Claimant had not reached maximum medical recovery. Obviously, Claimant's condition did not improve after March 23, 1977. To the contrary, by June 5, 1978, Dr. Leffert reported to Dr. Yudowitz that Claimant was nonfunctional, extremely depressed and having had no relief from the surgical procedures or physical manipulations. But Claimant is undergoing intensive treatment at the Pain Unit; Dr. Yudowitz testified that Claimant's depression can be treated; that the radiculopathy can diminish; that the program of treatment includes a program of physical therapy, a program of occupational therapy, a program of movement therapy, and a program of psychotherapy. Under the circumstances, as the medical testimony establishes that Claimant has not, at any stage, reached the point of maximum medical recovery and, further, that Claimant is currently undergoing an intensive and comprehensive program of medical care, I can only conclude that the award must be one for temporary total disability. *Hezekiah McCray* v. *Ceco Steel Co., et al., supra.*

I am aware, of course, that the accident occurred on August 21, 1975; but the passage of time, alone, cannot alter the fact that the medical testimony is plainly that Claimant has not reached maximum medical recovery. If it were merely the time following acromioplasty for Claimant to reach his maximum potential, it might well be possible to conclude that as the operation was performed March 30, 1976, Claimant has now reached a point of maximum medical recovery, indeed, Dr. Yudowitz so testified; but that is not the whole problem. In addition to the shoulder problem there is the radiculopathy and Claimant's psychotic depression. Claimant is undergoing treatment for these conditions and Dr. Yudowitz testified that he has not reached a medical end result, which I conclude means that Claimant has not reached maximum medical recovery. As Dr. Yudowitz testified that, at the present time, Claimant is totally disabled from doing any work, there is no question that Claimant is totally disabled; but as Claimant has not reached maximum medical recovery, his total disability remains temporary in character.

In view of the determination that, because Claimant has not reached maximum medical recovery his disability remains temporary and total, I do not reach the question of permanent total disability under Section 8(a) of the Act. I am well aware that a scheduled injury under Section 8(c) of the Act may, nevertheless, lead to a finding of permanent total disability under Section 8(a) where the facts show permanent total disability in an economic sense. *American Mutual Insurance Company of Boston* v. *Willie B. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Claimant's stipulation that he suffered a scheduled injury under Sections 8(c)(1) and (19) of the Act, while partially correct, is of doubtful significance in view of the facts which show that, in addition to the shoulder problem, Claimant suffered nerve damage, has a severe C-5,6 radiculopathy, and now suffers from depression. Claimant, obviously, is not

a Willie Jones and if the conditions for which he is undergoing treatment, i.e., the radiculopathy and depression, continue to improve, Claimant can be qualified for non-stressful work, but, see, *Diamond Drilling Company* v. *Marshall*, 577 F.2d 1003 (5th Cir. 1978). Nevertheless, until Claimant reaches maximum medical recovery, there is no basis on which it can be determined whether the disability is permanent and total or merely permanent and partial. The difference to Claimant in terms of benefits is, of course, that benefits payable for permanent total disability are subject to adjustment under Sections 10(f) and (g) of the Act while benefits for temporary total disability are not. I am fully aware of this fact. Nevertheless, where, as here, the medical evidence shows that Claimant has not reached maximum medical recovery and is undergoing active medical treatment it must be concluded that Claimant is temporarily totally disabled. Any party in interest may make application, pursuant to Section 22 of the Act, on the ground of a change in condition, and, as indicated herein, it is fully recognized that at such time as Claimant reaches maximum medical recovery it will be appropriate, and upon application necessary, to determine Claimant's degree of permanent disability.

B. *No Penalty is Assessable Under Section 14(e) of the Act*

In this case, notice that right to compensation under the Act was controverted was filed by the Carrier, Hartford Accident & Indemnity Company, on September 10, 1975 (ALJ Exh. 2). As the record shows that, following his fall from the conveyor on the night of August 21, 1975, Claimant was taken from the Employer's premises to the hospital by his foreman, it is clear that Employer was charged with knowledge of the injury on August 21, 1975. Section 14(d) of the Act provides that, "If

the employer controverts *the right to compensation* he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury . . . a notice . . . stating that the right to compensation is controverted. . . ." (Emphasis supplied.) The notice of controversion, filed September 10, 1975, was not filed within 14 days after knowledge of the injury.

On the other hand, the record shows three prior injuries to Claimant while employed by Employer; that in each prior instance Claimant was paid compensation under the Massachusetts Act; that in this instance, Claimant was paid compensation under the Massachusetts Act from August 21, 1975; and that Claimant did not file a claim under the Act until December 19, 1975 (or later. Claim (ALJ Exh. 1) is dated December 19, 1975; but bears a date stamp on its fact "Received Dec. 23, 1975, Boston Local Claims" and on the back a date stamp "1 OWCP Feb. 05, 1976," which would indicate that the claim was not received by the Office of the Deputy Commissioner until February 5, 1976).

In *Strachan Shipping Company* v. *Willie M. Davis*, 571 F.2d 968, (5th Cir. 1978), which directly concerned the time for filing a claim under §§ 2(2), 12(a), (b), (d) and 30(f) 33 U.S.C. § 902(2), 912(a), (b), (d), 930(f), the Court noted with respect to Section 14(b) of the Act, 33 U.S.C. § 914(b), as follows:

> "Subdivision 914(b) provides that the first payment of compensation shall become due on the fourteenth day after the employer has 'knowledge of the injury . . .' . . . the employer certainly cannot be asked to commence payment before he knows that the employee has, or at least claims to have sustained a compensable injury. . . ." (571 F.2d at 974).

It seems plain that Section 14(b) and Section 14(d) presuppose knowledge by the employer that the employee at least claims to have sustained an injury compensable under the Act. Section 14(e) provides that "If any *installment of compensation payable* . . . is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof . . . unless notice is filed under subdivision (d) of this section. . . ." (Emphasis supplied.) Again, no installment of compensation is payable under 14(b) unless the employer knows that the employee at least claims to have sustained an injury compensable under the Act. While it is clear that an award under the Act is not precluded by resort to a state's compensation program, *Newport News Shipbuilding and Dry Dock Company* v. *Director, Office of Workers Compensation Programs* and *Sammy J. Jenkins*, United States Court of Appeals for the Fourth Circuit, No. 77-1886 (September 21, 1978), Claimant's resort to the Massachusetts compensation program did negate knowledge of injury compensable under the Act as of the date of injury.

Moreover, having failed to give notice of injury in respect of which compensation is payable under the Act, as required by Section 12(a) of the Act and having received and accepted payment of compensation under the State Act, Claimant is estopped by his own conduct to claim "knowledge" by virtue of injury alone, within the meaning of Sections 14(a), (b), (d) and (e). That is, until Claimant gave notice of injury with respect to which he asserted compensation was payable under the Act, Employer did not have knowledge of injury claimed to be compensable under the Act and its notice of controversion given September 10, 1975, not less than 3 months prior to any notice of claim by Claimant under the Act was timely and bars assessment of a penalty under Section 14(e) of the Act.

Therefore, under the peculiar facts of this case, I conclude that, even though the notice given was not 14 days after knowledge of the injury, the notice of controversion was not less than 3 months prior to Employer-Carrier's knowledge that Claimant was asserting an injury compensable under the Act and was, therefore, timely within the meaning of Section 14(d) of the Act.

C. *Section 8(f) of the Act is Not Applicable*

Dr. Leffert testified that he believed that both the shoulder condition and the radiculopathy were reasonably connected with the injury of August 21, 1975. Dr. Yudowitz testified that none of Claimant's prior injuries or degenerative disc problems, associated with aging, was related to the radiculopathy or the depression; that both the radiculopathy and the depression were caused by the accident of August 21, 1975; and, further, Dr. Yudowitz testified that, in his opinion, the prior injuries and the degenerative condition had not made Claimant's present condition any more severe than if there had been only one injury to Claimant's shoulder in 1975.

Accordingly, as there is no evidence that Claimant's disability is not due solely to the injury of August 21, 1975, Section 8(f) has no applicability.

D. *Attorney's Fee*

In connection with the initial proceeding, counsel for Claimant had submitted an application for attorney's fees and costs. The claim of Claimant's attorney for allowance of an attorney's fee and costs was denied in the decision of April 8, 1977, because the claim for compensation was denied for lack

of jurisdiction. Pursuant to the Board's decision of March 20, 1978, the claim for attorney's fee and costs through the initial proceeding before me must now be allowed. This application will hereinafter be referred to as Application No. 1. In addition, counsel for Claimant has filed an application for attorney's fee and costs for the period from March 20, 1978 (the date of the Board's decision herein), which will be referred to hereinafter as Application No. 2.

Application No. 1 shows itemized hours from December 11, 1975 through June 21, 1976, in connection with the handling of this matter before the Deputy Commissioner. Total hours for this period: 20.9 hours. Total disbursements — $7.96.

Application No. 1 shows itemized hours from July 12, 1976, through March 30, 1977. Total hours for this period: 94.7. Total disbursements — $336.71.

Total fee and disbursement on Application No. 1 — $10,170.67.

Application No. 2 shows itemized hours from March 23, 1978, through August 30, 1978, plus estimated time for preparation of Claimant's Brief of 10 hours. Total hours for this period: 58.4. Total disbursements — $415.41 (including Dr. Yudowitz' fee.

Total hours Application 1 and 2: 174 hours
Total fee Application 1 and 2 — $14,780.00
Rate per hour $85.00

I am fully aware that the Benefits Review Board by Order dated June 5, 1978, approved a fee of $3,600.00 for services before it and that the Board stated, in part, as follows:

> "The Board finds that the hours submitted for services performed before the Board are excessive, in that the

issues involved were not complex, Claimant's attorney briefed only the status issue, and it appears that many of the services and work for which a fee is requested were not related to the appeal."

I am also aware that Claims Examiner William R. White, by letter dated October 1, 1976, with respect to the application made to the Office of the Deputy Commissioner for approval of an application for attorney's fees noted, in part,

". . . the application in itself is premature

* * * *

". . . We will hold your application for attorney's fee in abeyance until this case has been finally adjudicated."

Counsel for Claimant made his claim for an attorney's fee for services before the Deputy Commissioner part of his application for attorney's fee to the undersigned in connection with the initial proceeding in 1977, a copy was served on counsel for Employer-Carrier and no objection to any part of the application, including the work performed before the Deputy Commissioner was ever made. Accordingly, pursuant to *Dorothy A. Watkins* v. *Newport News Shipbuilding & Dry Dock Company*, BRB No. 78-237, 8 BRBS 556 (1978), I deem it appropriate to consider all services performed by counsel for Claimant, including the services before the Deputy Commissioner, required for the prosecution of this claim, except services before the Board or the First Circuit Court of Appeals as to which Section 28(c) of the Act lodges exclusive jurisdiction in the Board or Court to approve an attorney's fee for the work done before it by the attorney for the claimant.

The question of attorney's fees presents many facets. The Rules of Practice and Procedure of the Benefits Review Board, as revised, which will become effective October 19, 1978, in § 802.203 provides, in part, as follows:

> "(1) A complete statement of the extent and character of the necessary work done.
>
> * * * *
>
> "(4) The normal billing rate for each person who performed services on behalf of the claimant. This rate shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status.
>
> (d) Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, the amount of benefits awarded . . . A fee shall not necessarily be computed by multiplying time devoted to work by an hourly rate.
>
> * * * *"
>
> (20 C.F.R. § 802.203, Fed. Reg., Vol. 43, No. 182, Tuesday, September 19, 1978, at p. 42148).

Although the above Regulations directly relate to fees for services before the Board and, as revised, will not become effective until October 19, 1978, the Board has, in numerous cases, indicated that these are factors to be considered in determining the reasonableness of fees awarded by Administrative Law Judges in review proceedings before the Board. Consequently, the Board's revised Regulations merely restates what has been developed in prior case-to-case determinations and, for this reason, provide an appropriate and convenient frame of reference in this proceeding.

Some of the time on Application No. 2, for example, June 7-14, appears clearly to relate directly and solely to the appeal filed with the First Circuit Court of Appeals; some of the time on Application No. 2, for example, April 5, 6, May 4, appear to relate to consideration of settlement under the State Act. Such services do not appear to have been services "in the successful prosecution of his claim" as contemplated by Section 28(a) of the Act. The April 6, 1978, letter to the Board "requesting that advise concerning what action to be taken by them under the recent opinion remanding the case" (Application No. 2); the June 16 "Review of file and discussion with Deputy Commissioner's office . . . and Department of Labor, Washington, D.C. in effort to determine course to be adopted to achieve as speedy a hearing on remand as possible, including procedures to have papers transmitted from BRB prior to expiry of full appeal period or, alternatively, dismissal of appeal which had been entered by First Circuit in this case" (Application No. 2); July 12, "Five-page letter to Solicitor . . . requesting their advise concerning action to be taken on remand . . ." (Application No. 2), July 20 "Drafting Stipulation . . . that BRB might transmit papers to Office of ALJ now that carrier's appeal . . . dismissed." (Application No. 2); etc., either appear to have been unnecessary or indicate a substantial lack of experience in handling claims under the Act in which event the time may be excessive or the rate should be commensurate with a lower level of expertise, or both. Applications 1 and 2 are replete with notations such as March 5, 1976, "Letter to attorney"; "Letter to client" (Application No. 1); April 13, 1978, "Letter to BRB", "Letter to Attorney Nevils" (Application No. 2) which give no indication whatever of the character or necessity of work done.

As to the complexity of the case, there were two basic issues. First, coverage under the Act. There is no doubt that counsel for Claimant well and carefully prepared and presented the

factual basis for his position. Second, disability. Again, counsel for Claimant well and carefully prepared and presented his medical evidence; but there has been no dispute or disagreement as to medical aspects of the case, although, at the hearing on remand there was, and is, a question as to whether Claimant's present total disability is temporary or permanent. As to the amount of recovery, benefits payable under the Act are substantially greater than benefits under the State Act and for the period of temporary total disability to date the difference between compensation paid under the Massachusetts Act and the amount payable under the Act, although not computed, will probably exceed $20,000.00; payments for temporary total disability will continue until such time as Claimant reaches maximum medical recovery at which time compensation for permanent partial or permanent total disability will be determined. While no total figure can be placed at this time on the amount of benefits awarded, it is certainly fair to say that the amount of benefits will be substantial under the Act.

Weighing all factors, the total hours are excessive, in part, because of the inclusion of hours not related to the prosecution of the claim before the Deputy Commissioner or before me; in part, because many of the hours do not appear to have been reasonably necessary; in part, because no statement of the nature or necessity of the work has been indicated; and, in part, because the complexity of the factual and legal issues involved do not warrant the expenditure of 174 hours.

Recognizing that Employer-Carrier has not made any objection to either Application No. 1 or Application No. 2, which includes the rate of $85.00 per hour, I can only infer that Employer-Carrier do not question that the rate claimed is based on what is reasonable and customary in Boston, Massachusetts, where the services were performed. Because I find the hours involved excessive, I conclude that a reduction of

24 hours would reasonably compensate for the hours that are excessive for the reasons stated, and, accordingly, that a fee of $12,755.00 would be a reasonable attorney's fee pursuant to Section 28(a) of the Act.

I have examined the itemized disbursements set forth in Applications 1 and 2 and find that they constitute proper costs, fees and mileage for necessary witnesses, and pursuant to Section 28(d) of the Act further assess against the Employer-Carrier the total amount of $760.08 claimed as costs, fees and transportation.

Compensation Order[3]

1. Claimant, Richard F. McNeil, on August 21, 1975, was injured in the course of his employment with Employer, Prolerized New England Company, when he fell from the apron of the 8-Y conveyor of Employer's "Prolo" Mill, a drop at that point of about 15 feet, and seriously injured his right shoulder, arm and hand. As a result, Claimant has suffered a permanent partial loss of use of his right arm, has a severe C-5,6 radiculopathy, and suffers from a psychotic depression, all of which has rendered Claimant temporarily totally disabled since August 21, 1975.

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[3] This Order is made solely at the direction of the Board in its Order of Remand. As indicated above, I found that Claimant was not an employee within the meaning of Section 2(3) of the Act and compensation for his injury is not within the coverage of Section 3(a) of the Act. The Board disagreed and reversed and remanded. As noted above, I cannot, and do not, concur in, adopt, or make as my findings or conclusions those of the Board. Nevertheless, I am constrained by the Board's decision and order of remand to enter a compensation order in favor of Claimant.

2. Claimant is still undergoing intensive medical treatment, has not reached maximum medical recovery, and, accordingly, Claimant remains temporarily totally disabled.

3. Claimant's average weekly wage for the year preceding his injury of August 21, 1975, has been stipulated as $410.00.

4. Employer, Prolerized New England Company, and its insurance carrier, Hartford Accident and Indemnity Company (hereinafter collectively referred to as "Employer"), shall pay compensation for temporary total disability from August 21, 1975, for such time as Claimant remains temporarily totally disabled, pursuant to Section 8(b) of the Act, 33 U.S.C. § 908(b). Compensation for temporary total disability is, pursuant to Section 8(b), 66⅔ per centum of Claimant's average weekly wage, subject however to the limitation set forth in Section 6(b) of the Act, 33 U.S.C. § 906(b).

5. Employer shall pay the compensation due and payable pursuant to Paragraph 4, above, from August 21, 1975, less all payments of compensation previously made, including all payments under the Massachusetts Compensation Act, in a lump sum together with interest at the rate of 6 percent per annum on each payment as it became due from August 21, 1975, to the date of payment pursuant to this Order.

6. Employer shall furnish such medical services and supplies, in accordance with Section 7 of the Act, 33 U.S.C. § 907, for such period as the nature of the injury or the process of recovery may require.

7. Employer shall pay the sum of $12,755.00 to:

David M. Wright, Esquire
Atwood & Wright
211 Commonwealth Avenue
Boston, Massachusetts 02116

as a reasonable attorney's fee for legal services rendered Claimant from December 11, 1975, to date in the successful

prosecution of this claim, pursuant to Section 28(a), exclusive of legal services before the Board or any Court. In addition, pursuant to Section 28(d) of the Act, Employer shall pay to David M. Wright, Esquire, Atwood & Wright, the sum of $760.08 for reimbursement of costs.

8. Employer filed a timely notice of controversion within the meaning of Section 14(d) of the Act and, therefore, the request for payment pursuant to Section 14(e) of the Act is denied.

/s/_____
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 19, 1978
Washington, D.C.

WBD/mml

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
Washington, D.C. 20036

RICHARD F. McNEIL Claimant-Respondent	)	
v.	)	
PROLERIZED NEW ENGLAND COMPANY and HARTFORD ACCIDENT AND INDEMNITY COMPANY Employer/Carrier-Petitioners	)	FILED AS PART OF THE RECORD DEC 7, 1979 (date) / s / (Clerk) Benefits Review Board BRB No. 78-578

Decision and Order

Appeals from the Supplemental Decision and Order on Remand of William B. Devaney, Administrative Law Judge, United States Department of Labor.

David M. Wright (Atwood & Wright), Boston, Massachusetts, for the claimant.

David M. Mandel (Ropes & Gray), Boston, Massachusetts, for the employer.

Timothy F. Nevils, Boston, Massachusetts, for the carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

These are separate appeals by the employer and its insurance carrier from the Supplemental Decision and Order on Remand (77-LHCA-318) of Administrative Law Judge William B. Devaney pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

In these appeals, both employer and its insurance carrier have renewed their arguments that claimant is not covered by the Act. These same arguments, however, were presented by the parties and addressed by the Board in its prior decision, *McNeil* v. *Prolerized New England Co.*, 8 BRBS 1, BRB Nos. 77-328 & 77-328A (March 20, 1978), which we conclude constitutes the law of the case and thus governs our determination herein. *See United States* v. *United States Smelting, Refining and Mining Co.*, 339 U.S. 186 (1950), *reh. denied*, 339 U.S. 972 (1950); 5 Am Jur 2d, *Appeals and Errors*, § 744 *et al.*, and cases cited therein, at 744, n.18. Accordingly, our determination that claimant is covered by the Act is affirmed.[1]

Claimant argues in his response brief that the administrative law judge improperly failed to impose an additional assessment of compensation pursuant to Section 14(e) of the Act. 33 U.S.C. § 914(e).

We note that normally the Board will not address issues not appealed, but rather raised in a response brief. *See Boies* v. *National Steel and Shipbuilding Co.*, 7 BRBS 81, BRB No. 76-486 (Nov. 30, 1977). However, when it is necessary in the interests of justice, the Board may address errors of law which are apparent on the face of the record although they have not been properly preserved for review. *See Calhoun County, Florida* v. *Roberts*, 137 F.2d 130 (5th Cir. 1943); *U.S.* v. *353*

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[1] In line with our determination, the requests by employer and its insurance carrier for oral argument plus leave to file supplemental briefs are hereby denied. 20 C.F.R. §§ 802.214; 802.306.

Cases, Etc., 247 F.2d 473 (8th Cir. 1957). Indeed, in *Lagnes* v. *Green*, 282 U.S. 531, 538 (1931), the Supreme Court observed that the general rule, which would ordinarily preclude the Board from considering the Section 14(e) issue in this case, does not invalidate "the power of the Court to review objections urged by respondent [without having made proper appeal, cross-appeal, application for certiorari, or application for review] if the Court deems there is good reason to do so."

Because of the special nature of the additional assessment of compensation mandated by Section 14(e), we conclude that there is good reason to address the administrative law judge's conclusion of law concerning that issue.

Section 14(e) of the Act, 33 U.S.C. § 914(e), provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

The Board has consistently held that the additional assessment of compensation pursuant to Section 14(e) is mandatory. Thus, when proper compensation payments pursuant to the Act have not been made or a timely notice of controversion pursuant to Section 14(d) has not been filed or other circumstances justifying non-payment have not been established, the

additional assessment must be imposed. *See McDuffie* v. *Eller and Co.*, 10 BRBS 685, BRB No. 78-366 (May 25, 1979); *Crawford* v. *Trotti & Thomson, Inc.*, 9 BRBS 685, BRB No. 78-490 (Jan. 31, 1979); *Watkins* v. *Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, BRB No. 78-237 (June 30, 1978), *aff'd in pertinent part sub nom. Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, No. 78-1525, 9 BRBS 1089 (4th Cir. 1979); *Harris* v. *Marine Terminals Corp.*, 8 BRBS 712, BRB No. 78-329 (Aug. 24, 1978); *Cooper* v. *Cooper Associates, Inc.*, 7 BRBS 853, BRB Nos. 77-183 & 77-183A (June 31, 1978), *aff'd sub nom. Director, OWCP* v. *Cooper Associates, Inc.*, Nos. 78-1290 & 78-1295 (D.C. Cir. Sept. 28, 1979); *Jones* v. *Newport News Shipbuilding & Dry Dock Co.*, 5 BRBS 323, BRB No. 76-320 (Jan. 4, 1977), *aff'd sub nom. Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 573 F.2d 167, BRBS (4th Cir. 1978); *McCabe* v. *Ball Builders, Inc.*, 1 BRBS 290, BRB No. 74-181 (Jan. 31, 1975); *Ryan* v. *Mckie Co.*, 1 BRBS 221, BRB No. 74-160 (Dec. 10, 1974).

Section 14(e) plainly and unambiguously directs that an additional assessment "shall" be added to the unpaid installment. *See Director, OWCP* v. *Cooper Associates, Inc.*, Nos. 78-1290 & 78-1295 (D.C. Cir. Sept. 28, 1979). Moreover, the right to the additional assessment under Section 14(e) may not be waived nor is any "assignment, release, or commutation" of payments under Section 14(e) valid. *See* 33 U.S.C. §§ 915(b), 916. *See also Moore* v. *Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024, BRB No. 77-303 (March 7, 1978); *Harris* v. *Marine Terminals Corp.*, 8 BRBS 712, BRB No. 78-329 (Aug. 24, 1978).

Indeed, "[a] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy," and, "with respect to private rights created by federal

statute," such as those created by Section 14(e) of the Act, "the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 704, 705 (1945). *See Midstate Horticultural Co.* v. *Pennsylvania Railroad Co.*, 320 U.S. 356 (1943).

A careful reading of Sections 14(e), 15(b)[2] and 16[3] of the Act indicates that Congress intended that the ten percent additional assessment of compensation be an integral part of the "compensation or benefits due or payable under this Act." Whether considered similar to compensation or benefits, or as being additional compensation or benefits, these assessments fall under Sections 15(b) and 16 of the Act. Where it is clear on the face of the record, that such assessments must be imposed, a failure to do so may not be disregarded. Disregarding the administrative law judge's findings of fact which warrant imposition of the additional assessment pursuant to Section 14(e), and his improper denial of the Section 14(e) assessment, would clearly contravene the plain language of Section 14(e) and the policy of the Act, as evidenced by Section 14(e), 15(b), and 16.

Based on the foregoing, we conclude that there is good reason to address the Section 14(e) issue under the circumstances of this case.

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[2] Section 15(b), 33 U.S.C. § 915(b), provides:

> No agreement by an employee to waive his right to compensation under this Act shall be valid.

[3] Section 16, 33 U.S.C. § 916, provides:

> No assignment, release of commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

Turning to the case herein, we note that the administrative law judge found as follows:

B. *No Penalty is Assessable Under Section 14(e) of the Act*

> In this case, notice that right to compensation under the Act was controverted was filed by the Carrier, Hartford Accident & Indemnity Company, on September 10, 1975 (ALJ Exh. 2). As the record shows that, following his fall from the conveyor on the night of August 21, 1975, Claimant was taken from the Employer's premises to the hospital by his foreman, it is clear that Employer was charged with knowledge of the injury on August 21, 1975. Section 14(d) of the Act provides that, "If the employer controverts the *right to compensation* he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury . . . a notice . . . stating that the right to compensation is controverted. . . ." (Emphasis supplied). The notice of controversion, filed September 10, 1975, was not filed within 14 days after knowledge of the injury.

Decision and Order, slip op. at 20.

The administrative law judge reasoned, however, that claimant had been paid compensation under the state workmen's compensation act, and that employer believed that claimant was covered under the state act. The administrative law judge concluded that Section 14(e) did not apply because the employer must first be aware that the injury is covered by the Act.

We disagree. It is well settled that the notice of controversion must be filed within 14 days after knowledge of the in-

jury, not knowledge of the claim,[4] *see O'Leary* v. *Southeast Stevedore Co.*, 3 BRB 419, BRB No. 75-213 (April 19, 1976), and that an employer's failure to timely controvert on the grounds that the employer believed the injury was covered under a state act, and not the Longshore Act, does not excuse the Section 14(e) additional assessment, *see Jones* v. *Newport News Shipbuilding & Dry Dock Co.*, 5 BRBS 323, BRB No. 76-320 (Jan. 4, 1977), *aff'd sub nom. Newport News Shipbuilding & Dry Dock Co.* v. *Director OWCP*, 573 F.2d 167, BRBS (4th Cir. 1978).

Consequently, the administrative law judge's determination that the Section 14(e) additional assessment was not warranted is reversed. Accordingly, employer and its insurance carrier is responsible for an additional assessment of compensation of 10 percent on that installment not timely paid prior to the time employer filed its notice of controversion. *See Oho* v. *Castle & Cooke Terminals, Ltd.*, 9 BRBS 989, BRB Nos. 78-128 & 78-128A (Feb. 28, 1979).

So Ordered.

/s/_____

ISMENE M. KALARIS
Administrative Appeals Judge

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[4] However, in certain specified circumstances, employer is only required to file a notice of controversion within 14 days of the date that a controversy between the parties arises. *See Universal Terminal & Stevedoring Corp.* v. *Parker*, 587 F.2d 608, at 612, 9 BRBS 326 (3d Cir. 1978); *Devillier* v. *National Steel & Shipbuilding Co.*, 10 BRBS 649, BRB No. 78-178 (May 24, 1979). Those circumstances are clearly not present in this case.

MILLER, Administrative Appeals Judge, concurring in part and dissenting in part:

I join with Judge Kalaris in her resolution of all other issues raised in this case, however, for the reasons stated in my dissent in *Oho, supra*, 9 BRBS 993, I must note my dissent from that part of her opinion which limits any assessment under Section 14(e) to the date on which a controversion was belatedly filed. Failure to file a notice of controversion within 14 days of knowledge of injury or death or the arising of a controversy as required by Section 14(d) renders the notice of controversion untimely and each payment not made within 14 days after it becomes due is subject to the additional 10% assessment provided for in Section 14(e). *See also Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978), *aff'g* 5 BRBS 323, BRB No. 76-320 (Jan. 4, 1977), *cert. denied* 99 S.Ct. 563 (1978); *Newport News Shipbuilding & Dry Dock Co.* v. *Director*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979), *aff'g in pertinent part* 8 BRBS 556, BRB No. 78-237 (June 30, 1978) and *Director* v. *Cooper Associates, Inc.*, F.2d , , 10 BRBS 1058, 1061-1064 (D.C. Cir. 1979), *aff'g in pertinent part*, 7 BRBS 853, BRB No. 77-183 (Jan. 31, 1978). In all other respects, I concur.

/s/_____

JULIUS MILLER
Administrative Appeals Judge

SMITH, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I strongly dissent from the majority's review and resolution of an issue which was not only not properly briefed, but not even appealed.

In this case, the employer filed an appeal with the Board. In responding to the employer's petition for review, claimant also argued in his response brief that the administrative law judge improperly declined to award an additional assessment of compensation under Section 14(e). Significantly, claimant failed to appeal the Section 14(e) determination of the administrative law judge. Nor did claimant appeal any portion of the administrative law judge's decision.

The general practice previously adhered to by the Board is that "[t]he Board will not consider issues not appealed but rather raised in a response brief." *Boies* v. *National Steel & Shipbuilding Co.*, 7 BRBS 81, 85, BRB No. 76-486 (Nov. 30, 1977). Indeed, that practice is consistent with the general rule that "errors not made the subject of an assignment [of error] will not be considered. . . ." 5 Am Jur 2d, *Appeals and Error*, § 652. *See Bath Iron Works Corp.* v. *White*, 584 F.2d 569 (5th Cir. 1978), and authorities cited therein at 573, n.2; Rule 4(a) F.R.App.P. In light of claimant's failure to brief, let alone appeal, I find the majority's consideration of this issue totally inappropriate.

Nor am I persuaded by the majority's reliance on the "interests of justice" and its observation that Section 14(e) provides that the additional compensation "shall" be added. Most of the provisions of the Act provide in some form or another that certain actions or responsibilities "shall" be undertaken. *See e.g.*, Sections 6(a), 7(a), 8(a), 8(b), 8(c)(1) - 8(c)(21), 8(e), 8(f), 8(h), 9, 14(e), 14(f). However, in the absence of a proper appeal by a party challenging the lack of action and the administrative law judge's or deputy commissioner's determination, the Board has not previously considered itself with the authority to review the issue.[1] Indeed, Section 21(b)(3), the over-

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[1] The one exception is the question of coverage. The rationale for the Board's raising on its own the issue of coverage even when not expressly

riding mandate to the Board, clearly provides that we are "authorized to hear and determine *appeals* raising a substantial question of law or fact taken by any party in interest. . . ."

Furthermore, I find incongruous the majority's reliance on the "interests of justice" to support its review of the Section 14(e) issue, neither appealed nor briefed, when in *Craig* v. *American Dredging Co.*, 10 BRBS 1014, BRB No. 79-160 (Aug. 31, 1979), the Board concluded that it would not address the Section 14(e) issue, which was *appealed* by the employer, because the employer failed to argue or brief the applicable law or evidence. *See Craig, supra*, slip op. at 3, n.1. As in *Craig*, the claimant here failed to properly brief the applicable law and evidence. Further, claimant failed to even appeal the issue, whereas in *Craig*, the issue of Section 14(e) was appealed. In line with *Boies* and *Craig*, I would not address the Section 14(e) issue. If there is an error made by the administrative law judge, the party against whom the error was made should appeal.

I otherwise concur in the Board's determination.

/s/_____
SAMUEL J. SMITH, Chief
Administrative Appeals Judge

Dated this 7th day of December 1979

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appealed by any of the parties, is clear, however, and does not apply herein. In *Ramos* v. *Universal Dredging Co.*, BRBS , BRB Nos. 78-466 et al. (March 30, 1979), the Board provided a clear justification for raising on its own the issue of coverage: The Board reasoned that Section 2(3) and 3(a) provide subject matter jurisdiction — absent that jurisdiction, there is no authority to hear the claim.

United States Court of Appeals For The First Circuit

No. 80-1086.

PROLERIZED NEW ENGLAND COMPANY
AND
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
PETITIONERS,
v.
BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR, ET AL.,
RESPONDENTS.

DECREE

Entered December 23, 1980

This cause came on to be heard on appeal from a Petition for Review of a Decision and Order of the Benefits Review Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The Order of the Benefits Review Board is affirmed.

The motion to dismiss is denied without prejudice.

By the Court:

/s/_____
DANA H. GALLUP
Clerk.

A True Copy
Attest:
/s/_____
DANA H. GALLUP
Clerk,

[Cert. cc: Benefits Review Board, U.S. Department of Labor, Messrs. Mandel, Walters and Wright.]

No. 80-1609.

APR 82

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

PROLERIZED NEW ENGLAND COMPANY
AND
HARTFORD ACCIDENT & INDEMNITY COMPANY,
PETITIONERS,

v.

BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
AND
RICHARD F. McNEIL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondent Richard F. McNeil's Brief in Opposition to Petition for Writ of Certiorari.

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No. 80-1609.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

PROLERIZED NEW ENGLAND COMPANY
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BENEFITS REVIEW BOARD,
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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
AND
RICHARD F. McNEIL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondent Richard F. McNeil's Brief in Opposition to Petition for Writ of Certiorari.

Reasons for Denying the Petition for Writ of Certiorari.

The respondent, Richard F. McNeil, adopts the reasons set forth in the opposition brief filed herein by the Solicitor Gen-

eral, representing the U.S. Department of Labor and for the reasons stated therein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 80-1609

MAY 27 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

PROLERIZED NEW ENGLAND COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an employee at a waterfront plant for the processing and shipment of scrap metal, who regularly maintains a machine that cuts scrap steel into cargo-sized lengths integral to the loading process and who also occasionally participates in the loading of ships and in the repair of shiploading equipment, is engaged in "maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1609

PROLERIZED NEW ENGLAND COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 637 F.2d 30. The administrative law judge's original decision and order (Pet. App. 19a-32a) and his decision and order on remand (Pet. App. 41a-77a) are unreported. The original opinion of the Benefits Review Board (Pet. App. 33a-40a) is reported at 8 B.R.B.S. 1. The second opinion of the Benefits Review Board (Pet. App. 78a-87a) is reported at 11 B.R.B.S. 576.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1980 (Pet. App. 88a). The petition for a writ of certiorari was filed on March 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Prolerized New England Company operates a scrap metal business on the shore of the Mystic River in Everett, Massachusetts. Petitioner's metal processing facility has its own dock and shiploading equipment, and almost all of the processed scrap steel is loaded aboard ships by Prolerized's employees and shipped from its dock (Pet. App. 2a-3a, 22a-23a, 34a).

Prolerized buys scrap metal in the form of junked cars, refrigerators, railroad ties, and the like. It processes the scrap in one of two ways, depending on the kind of material involved. Approximately 60% of the metal is processed in the "Prolo Mill," a large machine that separates ferrous metal from plastic, glass, and non-ferrous metals and converts the metal into fist-sized chunks called "prolo steel" (Pet. App. 2a-3a, 22a, 34a). The remaining 40% of the scrap metal is processed by the "Shear," another huge machine that cuts steel into lengths of four feet or less that will fit easily into the holds of ships (*id.* at 3a, 23a, 34a). Both prolerized and sheared steel is stockpiled in petitioner's yard. Sheared steel is eventually moved from the stockpiles to the dock by truck, where it is loaded aboard ships by crane (*id.* at 3a, 34a). Prolo steel is loaded using a bulldozer and shiploader conveyor (*id.* at 34). Ships arrive at petitioner's dock on an average

of once a month and usually are loaded in two or three days (*id.* at 3a, 23a).

Respondent Richard F. McNeil was employed by Prolerized as a maintenance man to maintain and repair all company equipment, including the Shear and the Prolo Mill (Pet. App. 3a, 23a, 34a). Although McNeil was not assigned to the shiploader crew, which Prolerized employed to load ships and to maintain its shiploading equipment, he was required to assist the shiploaders whenever they were shorthanded (*id.* at 4a, 23a-24a). He was also required on occasion to go aboard a vessel to repair shiploading equipment or to assist in the loading operation itself. In addition, he occasionally had to man lines on the dock (*id.* at 38a). When McNeil arrived at work each day, he did not know to which part of his employer's operation he would be assigned (*id.* at 4a, 23a, 24a, 35a).[1]

On August 21, 1975, respondent McNeil was injured in the course of his employment. McNeil had worked for Prolerized as a maintenance man for two and one-half years before his injury. At the time of his injury and for the preceding several months, McNeil had been assigned to the night shift, during which Prolerized's processing machinery was not in operation (Pet. App. 3a-4a, 23a). On the night shift, McNeil performed routine maintenance and repairs on both the Prolo Mill and the Shear. He also changed the filters on the Shear each Saturday morning (*id.* at 11a-12a, 24a, 29a-30a). Before McNeil's injury, no ship had been loaded at the Prolerized dock for at least two months (*id.* at 4a). McNeil was in-

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[1] Like all of Prolerized's yard employees, McNeil was represented by the International Longshoremen's Association Local 1908, AFL-CIO (Pet. App. 23a).

jured while replacing some of the wheels and pins on the conveyor used to feed scrap metal into the Prolo Mill. He fell 15 feet from the apron of the conveyor to the ground, seriously injuring his shoulder, arm, and hand (*ibid.*).

Respondent McNeil filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* Petitioners, Prolerized and its workers' compensation insurance carrier, Hartford Accident & Indemnity Company, disputed the claim on several grounds, only one of which they press in this Court. Petitioners argued that respondent McNeil was not engaged in maritime employment and therefore was not a covered "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3). An administrative law judge, writing before this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), acknowledged that McNeil occasionally performed maritime duties (Pet. App. 30a) but ruled that coverage under the Act is "governed by the nature of a claimant's employment at the time of his injury" (*id.* at 26a). The administrative law judge concluded that McNeil was not covered, because, at the time of his injury, he was "employed in the manufacturing, or reprocessing, phase of Employer's operation which was wholly separate and distinct from the loading of vessels" (*id.* at 30a).

Respondents McNeil and the Director, Office of Workers' Compensation Programs, appealed to the Benefits Review Board under 33 U.S.C. (& Supp. III) 921(b). The Board reversed, relying on this Court's statement in *Caputo* (432 U.S. at 273) that Congress intended to cover "persons whose employment is such

that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity." In light of *Caputo*'s focus on a claimant's overall occupation, the Board ruled that the administrative law judge erred by inquiring solely into the nature of McNeil's activities at the time of his injury. The Board stressed that, under the facts found by the administrative law judge, McNeil's job required him to maintain and repair all company equipment, including "the shearer machine, used in cutting the scrap metal to four-foot lengths in order to fit into the holds of ships, and the gantries and shiploader used in loading the scrap metal onto the dockside ships" (Pet. App. 38a). In addition, the Board observed (*ibid.*), McNeil was occasionally called upon to repair loading equipment aboard ship, to man lines on the dock, and otherwise to assist in the loading operation. Based on these facts and on earlier Board decisions holding that maritime employment includes the maintenance and repair of loading machinery[2] and the operation of a shear machine cutting metal destined for export,[3] the Board concluded (Pet. App. 39a) that McNeil was "clearly engaged in maritime employment and covered part of his workday or workweek" and that therefore, "[a]pplying the 'continuous coverage' reasoning of Congress and the Court in *Caputo/Blundo*," McNeil's overall occupation qualified as maritime employment, and he satisfied the status test of Section 2(3).

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[2] *Vinciquerra* v. *Transocean Gateway Corp.*, 1 B.R.B.S. 523 (1975); *Stecz* v. *Sea-land Service, Inc.*, 6 B.R.B.S. 291 (1977).

[3] *Shoemaker* v. *Schiavone & Sons*, 2 B.R.B.S. 257 (1975).

On remand, the administrative law judge found that respondent McNeil had suffered a permanent partial loss of the use of his right arm and that he was temporarily totally disabled. The administrative law judge entered a compensation order (Pet. App. 41a-77a), and petitioners appealed to the Benefits Review Board. The Board refused to reconsider the coverage issue and adjusted the compensation award (*id.* at 78a-87a). Petitioners then sought judicial review under 33 U.S.C. 921(c), and the court of appeals affirmed the Board's ruling.

The court ruled that the Board was correct in characterizing the Shear as "an integral part of the loading operation" (Pet. App. 9a-10a). The court observed that, unlike the Prolo Mill, which "actually changes the composition of scrap metal by separating it into component parts," the Shear "merely changes the shape of scrap steel to prepare it for shipment" (*id.* at 9a). Accordingly, the court approved the Board's determination that respondent McNeil's regular maintenance, repair, and operation of the Shear were part of the overall "process of moving cargo from the land transportation on which it arrived to the ships on which it left" (*id.* at 10a). The court also agreed with the Board that, when McNeil's work on the Shear was considered along with his occasional manning of lines on the dock and his occasional boarding of ships to repair loading equipment or to assist in positioning a collar and chute over the hold prior to loading, it justified the conclusion that "a substantial portion of McNeil's duties involved longshoring activity" (*id.* at 11a). On this basis, the court held that McNeil was engaged in maritime employment as a matter of occupation.

In response to petitioners' complaint that the Board had impermissibly conducted its own review of the record to determine that the purpose of the Shear was "to cut steel to fit into the holds of ships," the court observed that the administrative law judge had not made any statement or finding to the contrary, that McNeil's testimony regarding the function of the Shear was uncontested, and that petitioners failed to adduce any evidence concerning the nature of Prolerized's operations, despite an explicit invitation from the administrative law judge to do so (Pet. App. 8a). Accordingly, the court held that the record would support no factual determination other than the Board's and that therefore the Board acted properly in resolving the coverage question without a remand for further findings (*id.* at 8a-9a).

ARGUMENT

1. The result reached by the court of appeals is correct and follows directly from this Court's decisions under the Longshoremen's and Harbor Workers' Compensation Act. Persons who "spend *at least some* of their time in indisputably longshoring operations" are engaged in maritime employment by occupation and are therefore covered employees within the meaning of 33 U.S.C. 902(3). *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977) (emphasis added). A land-based worker who performs "some portion" of the movement of cargo between ship and land transportation "is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 82-83 (1979). Under these principles, respondent McNeil would be a covered employee under Section

2(3), even if the only aspects of his job to be considered were his occasional manning of lines on the dock, repair of loading equipment aboard ship, and assistance in the actual loading operation.[4] And, as we have recently argued in another case under the Act,[5] we do not believe that there is any conflict among the circuits regarding this proposition.

Petitioners cite a number of cases that assertedly adopt a standard for "maritime employment" more stringent than the one described above and derived from *Caputo* (see Pet. 7), but those cases do not support the allegation of a live disagreement among the courts of appeals. *Maher Terminals, Inc.* v. *Farrell*, 548 F.2d 476 (3d Cir. 1977), was decided before *Caputo*, and the Third Circuit has recently acknowledged that, in light of *Caputo*, the court's earlier emphasis on a worker's primary duties "may have reflected too narrow an interpretation" of the Act. *Dravo Corp.* v. *OSHRC*, 613 F.2d 1227, 1233 n.9 (1980). *Cargill, Inc.* v. *Powell*, 573 F.2d 561 (9th Cir. 1977), involved a dock worker who, in the view

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[4] The court of appeals stated that the administrative law judge's characterization of McNeil's conventional longshoring work as "occasional" "appears to have been unwarranted" (637 F.2d at 38 n.3). (As reprinted in the appendix to the petition, the court of appeals' opinion erroneously includes the word "warranted" where "unwarranted" should appear. See Pet. App. 13a n.3.) In view of the court's reliance on McNeil's work with respect to the Shear, however, the court found it unnecessary to reach the Director's contention that McNeil's more conventional longshoring duties were alone sufficient to establish coverage under the Act.

[5] See *Howard Trucking Co.* v. *Boudloche*, petition for cert. pending, No. 80-1563 (filed Mar. 14, 1981), Br. for the Fed. Resp. in Opp. at 6 & n.5. We are supplying copies of this brief to the parties in the present case.

of the panel majority, had *nothing whatever* to do with the loading and unloading of ships. (In any event, this Court vacated and remanded the decision in *Powell* for reconsideration in light of *P.C. Pfeiffer Co.* v. *Ford, supra.* See 444 U.S. 987 (1979).[6]) *Fusco* v. *Perini North River Associates*, 622 F.2d 1111 (2d Cir. 1980), cert. denied, Nos. 80-639 and 80-651 (Jan. 26, 1981), concerns an issue altogether different from the amount of longshoring activity a worker must perform before he can be said to be "engaged in maritime employment" by occupation.[7]

Moreover, and more important, *this* case does not present an opportunity to resolve the conflict petitioners purport to discern. The court of appeals did not hold, as petitioners contend, that respondent McNeil was engaged in maritime employment solely because he "occasionally" engaged in longshoring activities. On the contrary, the court ruled that "a *substantial* portion of McNeil's duties involved longshoring activity" (Pet. App. 11a; emphasis added). Petitioners may challenge that factual conclusion, of course, but they may not argue that this Court should grant review to resolve an alleged conflict with circuits that supposedly require substantial, not merely occasional, longshoring activity as a precondition for employee status under Section 2(3).

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[6] On remand, the court of appeals withdrew its opinion and affirmed the Benefits Review Board's decision that the injured worker *was* covered by the Act. 625 F.2d 330 (1980).

[7] Judge Wyzanski, who wrote the opinion for the court of appeals in *Fusco*, joined in the panel's opinion in the present case. This circumstance further belies petitioners' assertion that there is some inconsistency between *Fusco* and the decision below.

2. The second question presented by petitioners is based on the false premise that the court of appeals affirmed the Benefits Review Board's decision on a ground not addressed or relied upon by the Board (Pet. 9-11). Notwithstanding petitioners' apparent impression to the contrary, the Board, like the court of appeals, relied in part on respondent McNeil's regular repair and maintenance and occasional operation of the Shear as a basis for the conclusion that McNeil was engaged in maritime employment (Pet. App. 38a). McNeil's duties in connection with the Shear unquestionably constituted a significant portion of his job;[8] the Board did not say anything to the contrary. The court of appeals properly followed the Board in considering those duties as part of McNeil's contribution to the overall loading operation, and the court did not overstep its bounds by concluding that a *substantial* portion of McNeil's duties involved longshoring activity. The fact that the Board's opinion did not use the word "substantial" in describing the extent of McNeil's involvement in the loading process does not preclude the court of appeals from applying that quantitative term to the very activity on which the Board relied in reaching its coverage decision.

3. For the reasons well stated by the court of appeals (Pet. App. 8a-9a), the Benefits Review Board

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[8] Although petitioners assert (Pet. 8) that McNeil's responsibility for the Shear during his months on the night shift was limited to the weekly changing of the machine's filters, the court of appeals correctly observed (Pet. App. 11a-12a) that there was no evidence that McNeil's duties with respect to the Shear were reduced during the months preceding his accident, and in fact McNeil testified without contradiction that maintenance of the Shear was one of his main functions at the time of his injury (*ibid.*).

properly decided the coverage question without remanding for additional findings by the administrative law judge concerning the function of the Shear. Respondent McNeil testified that the Shear's purpose was to cut steel to fit into the holds of ships. The testimony was not challenged or contradicted. In fact, petitioners presented no evidence on this or any other matter regarding Prolerized's operations. Even now, petitioners do not suggest that the Shear cut steel for some other purpose.[9] Nevertheless, because the administrative law judge did not specify the machine's purpose in his decision, petitioners contend that the Board was not authorized to rely on the record testimony concerning the Shear's connection to the loading process. This argument is without merit and is not supported by the court of appeals' decisions on which petitioners rely (Pet. 11-12). The Board's action here does not involve the substitution of an appellate body's views for those of the finder of fact. The Board's comments were fully consistent with the administrative law judge's findings, and the factual accuracy of those comments was and is un-

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[9] The petition in this case does not present any question concerning the correctness of the court of appeals' observation that "the Shear is a physically distinct part of the employer's operation whose sole function is to prepare goods for shipment" (Pet. App. 10a). The court accurately characterized the shearing process as "the functional equivalent of packaging" and analogized it to the marking and checking function performed by the employee Blundo in *Caputo* (*ibid.*). The Shear was in fact, as the court of appeals said, "an intermediate and necessary step in the process of moving cargo from the land transportation on which it arrived to the ships on which it left" (*ibid.*). Accordingly, the Board and the court of appeals were justified in considering respondent McNeil's work on the Shear as longshoring activity within the meaning of Section 2(3).

disputed. In such circumstances, the Board was not required to make its coverage decision solely on the basis of statements within the confines of the administrative law judge's decision, as if the rest of the record did not exist.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-1609.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1980.

PROLERIZED NEW ENGLAND COMPANY
AND
HARTFORD ACCIDENT & INDEMNITY COMPANY,
PETITIONERS,
v.
BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
AND
RICHARD F. McNEIL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief in Support of Petition for Certiorari.

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Reply Brief in Support of Petition for Certiorari.

Argument.

1. On the issue of whether the First Circuit's decision was consistent with this Court's decision in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943),

332 U.S. 194 (1947), and progeny, respondents state, without any citation of authority, that

> The fact that the Board's opinion did not use the word "substantial" in describing the extent of McNeil's involvement in the loading process does not preclude the court of appeals from applying that quantitative term. . . .

Brief for the Federal Respondent in Opposition (hereinafter "Dir. Br."), p. 10. However, the problem in this case is not one of semantics, but of substance. Certainly the fact that the Board did not use the word "substantial" to describe McNeil's longshoring duties would be unimportant if it were clear that the Board in fact applied a substantiality-of-duties test. However, as the respondents themselves recognize, Dir. Br., p. 5, the Board in this case did *not* apply such a test, but rather reasoned that under this Court's decision in *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977), it is sufficient for coverage under the Longshoremen's and Harbor Workers' Compensation Act that an employee is covered for "part" of his employment.[1] Since the Board based its decision on this broad interpretation of *Caputo*, the First Circuit was required under *Chenery* to "judge the propriety" of the Board's decision "solely by the grounds invoked" by the Board. 332 U.S. at 196. Contrary to respondents' contention, the essence of *Chenery* (and allocation of decision-making functions between the courts and the Board) is that the court of appeals may not *sua sponte* apply a substantiality-of-duties test

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[1] Indeed, it is precisely this interpretation of *Caputo* which the respondents urge in this case, Dir. Br., pp. 7-9, and in *Howard Trucking Co., Inc.* v. *Boudloche*, Dir. Br., pp. 6-10, and it is precisely this expansive assertion of jurisdiction by the Board which makes this case worthy of this Court's review.

to "the very activity on which the Board relied in reaching its coverage decision," Dir. Br., p. 10, because it is the function of the administrative law judge and the Board to determine whether McNeil's longshoring duties were "substantial," and the Board simply has not made such a determination in this case.[2]

In an effort to avoid this conclusion, respondents argue that McNeil's duties in connection with the Shear "unquestionably constituted a significant portion of his job." Dir. Br., p. 10. Although it is not this Court's function to make such a "factual" inquiry (Dir. Br., p. 9), it should be noted that the administrative law judge found, and the Board did not question, that for several months prior to his injury, McNeil worked on the night maintenance shift and was regularly assigned to the Prolo Mill (A. 24a, 29a), and that during that period McNeil also was responsible for changing the filters on the Shear only on Saturday mornings (A. 11a, 29a-30a). Contrary to respondents' contention, Dir. Br., p. 3, there is no evidence that McNeil performed routine maintenance and repairs "on both the Prolo Mill and the Shear" while he was on the night shift, or that McNeil "regularly maintain[ed]" the Shear. Dir. Br., p. I.[3] Similarly, the record does *not* indicate that McNeil

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[2] Respondents urge that the Board "did not say anything to" contradict respondents' contention that McNeil's duties with respect to the Shear "constituted a significant portion of his job." However, in reviewing a decision of the Benefits Review Board, a court of appeals is not free to draw factual inferences simply because they are not inconsistent with the decisions below. *See, e.g., Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670, 672 n.3 (2d Cir. 1979).

[3] In support of this contention, respondents rely on the First Circuit's statement that "there was no evidence that McNeil's duties with respect to the Shear were reduced in the weeks and months before his accident." A. 11a. However, it is undisputed that for several months prior to his injury, McNeil was assigned to the night maintenance shift and McNeil's own testimony was that during this period, it was on Saturday mornings that he worked on the

"was required to assist the shiploaders whenever they were shorthanded." Dir. Br., p. 3. The record shows only that when the shiploader crew was shorthanded,[4] "extra men" were assigned to assist the shiploading crew, R. 68, and that "occasionally" McNeil was among the employees so assigned (A. 22a, 38a).

2. Respondents correctly observe, Dir. Br., p. 9, that the First Circuit did not hold that McNeil was covered by the Act because he "occasionally" engaged in longshoring duties. However, as discussed above, the decision of the Board was predicated on such a holding and, accordingly, under the rule of *Chenery*, the Board's decision may be affirmed (if at all) only on that ground. Accordingly, as respondents recognize, Dir. Br., pp. 7-9, the question of whether an employee who performs longshoring duties "occasionally" is covered by the Act is an important issue in this case.

Respondents oppose the granting of certiorari on this issue on the ground that it has been settled by this Court's decisions in *Caputo* and *P. C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69 (1979). However, there is nothing in *Caputo*, which involved a longshoreman who engaged in longshoring operations on a daily basis, to support respondents' view. *See* Petition for

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Shear. R. 100. For the same reason, it is not true that "When McNeil arrived at work each day, he did not know to which part of his employer's operation he would be assigned." Dir. Br., p. 3. Although McNeil so testified at one point, apparently in reference to some period of time during the course of his 2½ years of employment at Prolerized prior to the time that he was assigned to the night maintenance shift, the administrative law judge's specific factual finding, that during the period that McNeil was assigned to the night maintenance shift he was regularly assigned to the Prolo Mill, was to the contrary.

[4] McNeil testified that the shiploader crew needed no assistance from other employees, and he therefore performed no duties, in connection with the loading of "prolo" steel, R. 43, which comprises 60% of Prolerized's business. R. 37.

Writ of Certiorari, pp. 7-8. If, as respondents contend, this Court had intended to suggest that employees are covered by the Act if they spend or ever spent *any* of their time in longshoring activities, the Court never would have cited with approval the Third Circuit's decision in *Maher Terminals, Inc.* v. *Farrell*, 548 F.2d 476 (3d Cir. 1977), and the Fourth Circuit's decision in *Stockman* v. *John T. Clark & Sons, Inc.*, 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), which had adopted "primary duties" and "overall duties" tests, respectively.

Similarly, there is nothing in this Court's decision in *Ford*, which involved the question of whether loading or unloading cargo being transferred between land and water-based shippers is a "longshoring operation" at all, to support the contention that an employee who performs longshoring operations only "occasionally" is covered by the Act during the entire course of his employment. Indeed, this Court's fundamental holding in *Ford* was that the Act establishes "an *occupational* test," 444 U.S. at 80 (emphasis added), and it would be irrational to rule that an employee who "occasionally" engages in longshoring duties but who spends no significant amount of time on such duties is employed in the occupation of "longshoreman."

Contrary to respondents' contention, Dir. Br., pp. 8-9, the Second, Third and Ninth Circuits have taken a position conflicting with that of respondents and the Fifth Circuit in *Boudloche* v. *Howard Trucking Co., Inc.*, 632 F.2d 1346 (5th Cir. 1980), *cert. filed*, Docket No. 80-1563, March 14, 1981. The Third Circuit in *Dravo Corp.* v. *OSHRC*, 613 F.2d 1227, 1233 n.9 (3d Cir. 1980), did *not* abandon its earlier decisions in *Maher Terminals, Inc.* v. *Farrell, supra, cited with approval in Caputo, supra*, 432 U.S. at 272-273 n.34, and *Dravo Corp.* v. *Banks*, 567 F.2d 593 (3d Cir. 1977). In *Dravo Corp.* v. *OSHRC*, the Third Circuit stated only that its earlier sug-

gestion in *Dravo Corp.* v. *Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977) — that the "great majority" of an employee's work must be maritime in nature in order to bring an employee within the scope of the Act — "may have reflected too narrow an interpretation of the Act." 613 F.2d at 1233 n.9. The Third Circuit did not even suggest that it was abandoning the "primary duties" test of *Banks* or *Farrell*. Similarly, although the issue which this Court considered in *Cargill, Inc.* v. *Powell*, 573 F.2d 561 (9th Cir. 1977), *vacated and remanded*, 444 U.S. 987 (1979), did not involve the question presented by this case, the Ninth Circuit in *Cargill* squarely ruled that an employee who had not engaged in longshoring duties for several months at the time of his injury was not covered by the Act, and that the language in *Caputo* relied upon by respondents herein must be read in light of the fact that the employee in that case spent "a part of" each workday in longshoring activities. 573 F.2d at 563-564.[5] Finally, the Second Circuit in *Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028 (1980), clearly stated that coverage under the Act depends upon an employee's "major activities." 601 F.2d at 668.[6]

3. Respondents' assertion (Dir. Br., p.11 n.9) that the petition "does not present any question concerning the correctness

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[5] In view of this Court's disposition of *Cargill*, it had no occasion to consider the Ninth Circuit's holding on this issue.

[6] Respondents note, Dir. Br., p. 9 n.7, that Judge Wyzanski, who wrote the Second Circuit's decision in *Fusco*, joined in the First Circuit's decision in this case. However, the First Circuit, by applying *sua sponte* a substantiality-of-duties test which was not relied upon by the Board, found it "unnecessary" to consider the contention that "occasional" duties are sufficient for coverage under the Act. In short, by failing to adhere to the scope of review dictated by *Chenery*, the First Circuit eliminated the possibility that its decision could conflict with the Second Circuit's decision in *Fusco* on this point.

of the court of appeals' observation that the Shear is a physically distinct part of the employer's operation whose sole function is to prepare goods for shipment" is incorrect. The First Circuit's observation in this regard was predicated on the Board's "foray into the record" (A. 8a), to make a factual finding with respect to the purpose of the Shear, which petitioners contend was improper.

Respondents' principal defense of the Board's "foray into the record" is that McNeil's testimony "was not challenged or contradicted." However, it was undisputed that the Shear cut all "heavy" steel into strips of four feet or less and McNeil himself admitted that the sheared metal was not necessarily loaded onto ships (R. 38; A. 23a). On the basis of this evidence, it would be proper to infer that the cutting performed by the Shear serves a number of purposes, such as accommodating customers' furnaces, facilitating transportation, and the like. *Cf. Castro* v. *Hugo-Neu Proler Co.*, 10 BRBS 35 (1979).[7]

Respondents also seek to dismiss the problem of the Board's fact-finding by suggesting that the only problem was that "the administrative law judge did not specify the machine's purpose in his decision" (Dir. Br., p. 11). However, while the administrative law judge did not *in haec verba* discredit McNeil's testimony, it is clear that the administrative law judge did not accept this testimony. He found that metal is

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[7] Petitioners urged this point in the court of appeals, and respondents therefore are mistaken in asserting (Dir. Br., p. 11) that "[e]ven now, petitioners do not suggest that the Shear cut steel for some other purpose." Indeed, petitioners contended in the court of appeals, as they do before this Court, that if the record with respect to this jurisdictional issue — as to which the claimant has the burden of proof — appears inadequate to enable review of the administrative law judge's decision, the case should be remanded to the administrative law judge for additional factual findings or further proceedings.

"processed" through the Shear (A. 23a), and that all of McNeil's work for the months prior to his injury was related to "the manufacturing or reprocessing phase of Employer's operation which was wholly separate and distinct from the loading of vessels" (A. 30a). He distinguished a prior decision by the Board on the ground that that case "involved . . . a shearer machine cutting scrap metal destined for export," whereas McNeil "was injured while employed in the manufacturing, or reprocessing, phase of Employer's operation" (A. 30a-31a). On remand, he vigorously protested the Board's factual findings (A. 42a, 45a-49a, 75a n.3). In these circumstances, respondents' contention that "The Board's comments were fully consistent with the administrative law judge's findings" (Dir. Br., p. 11) is simply wrong.

Conclusion.

For the foregoing reasons and for the reasons stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

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